No. _____

In the Supreme Court of the United States

VIRGINIA HOUSE OF DELEGATES,
M. KIRKLAND COX,

Appellants,

v.

GOLDEN BETHUNE-HILL, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the district court conducted a proper "holistic" analysis of the majority-minority Virginia House of Delegates districts under the prior decision in this case, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017), even though it ignored a host of evidence, including:

   a. the overwhelming majority of district lines, which were carried over unchanged from the prior map;

   b. the geographic location of population disparities, which imposed severe redistricting constraints and directly impacted which voters were moved into and out of the majority-minority districts; and

   c. the degree of constraint the House's Voting Rights Act compliance goals imposed in implementation, which was minimal.

2. Whether the *Bethune-Hill* "predominance" test is satisfied merely by a lengthy description of ordinary Voting Rights Act compliance measures.

3. Whether the district court erred in relying on expert analysis it previously rejected as unreliable and irrelevant and expert analysis that lacked any objective or coherent methodology.

4. Whether the district court committed clear error in ignoring the entirety of the House's evidentiary presentation under the guise of credibility determinations unsupported by the record and

predicated on expert testimony that should not have been credited or even admitted.

5. Whether Virginia's choice to draw 11 "safe" majority-minority districts of around or above 55% black voting-age population ("BVAP") was narrowly tailored in light of:

a. the discretion the Voting Rights Act afforded covered jurisdictions to "choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice," *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003), or

b. the requirement the Voting Rights Act, as amended, imposed on covered jurisdictions "to prove the absence of racially polarized voting" to justify BVAP reductions towards or below 50% BVAP, *id.* at 500 n.3 (Souter, J., dissenting).

6. Whether the district court erred in ignoring the district-specific evidence before the House in 2011 justifying safe districts at or above 55% BVAP.

PARTIES TO THE PROCEEDING

The Plaintiffs below are: Golden Bethune-Hill, Christa Brooks, Chauncey Brown, Atoy Carrington, Alfreda Gordon, Cherrelle Hurt, Tavarris Spinks, Mattie Mae Urquhart, Sheppard Roland Winston, Thomas Calhoun, Wayne Dawkins, Atiba Muse, Nancy Ross.

The Defendants below are: Virginia State Board of Elections, James B. Alcorn in his official capacity as Chairman of the Virginia State Board of Elections, Virginia Department of Elections, Christopher E. Piper in his official capacity as Commissioner of the Virginia Department of Elections, Clara Belle Wheeler in her capacity as Vice-Chair of the Virginia State Board of Elections, Singleton B. McAllister in her capacity as Secretary of the Virginia State Board of Elections.

The Intervenor-Defendants below are: Virginia House of Delegates, M. Kirkland Cox in his official capacity as Speaker of the Virginia House.

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JURISDICTIONAL STATEMENT

Appellants the Virginia House of Delegates and Speaker M. Kirkland Cox appeal to the Supreme Court from the permanent injunction of the Eastern District of Virginia entered on June 26, 2018, forbidding the use of Virginia House Districts HD69, HD70, HD71, HD74, HD77, HD80, HD89, HD90, HD92, and HD95 under the Fourteenth Amendment to the United States Constitution. This Court has jurisdiction, and this appeal presents multiple substantial federal questions.

OPINION BELOW

The three-judge court's yet-to-be-published opinion is available at 2018 WL 3133819 and J.S.App.1-201. The court's 2015 decision is available at 141 F. Supp. 3d 505 and J.S.App.204-356.

JURISDICTION

This appeal is from the district court's permanent injunction, J.S.App.202, and the Court has jurisdiction under 28 U.S.C. §1253. Appellants filed their notice of appeal on July 6, 2018. J.S.App.357.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Fourteenth Amendment and §§2 and 5 of the Voting Rights Act, 52 U.S.C. §§10301, 10304, which are reproduced at J.S.App.359-64.

STATEMENT OF THE CASE

A. In 2011, the Virginia General Assembly passed a districting plan for its House of Delegates districts that garnered overwhelming bipartisan support including from all but two members of the House Black Caucus. Like all Virginia House plans since 1991, the 2011 plan contained 12 majority-black districts. In an effort to satisfy Voting Rights Act (VRA) §5, "legislators concluded that each of the 12 districts needed to contain a" black voting-age population ("BVAP") of "at least 55%," a target that "was used in structuring the districts." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 795-96 (2017).

That goal was founded on input from the House Black Caucus, and a broad consensus supported it. Delegate Lionel Spruill, the Black Caucus Vice Chair, stated on the House floor in 2011 that "mostly every member of the Black Caucus" had input, as did NAACP leaders in Suffolk, Chesapeake, and Virginia Beach. Plaintiffs' Exhibit ("PEX") 35 at 142, 146-47, 149. Delegate Rosalyn Dance, another Black Caucus leader, advocated for the plan, stating "it does provide the 55 percent voting strength that I was concerned about as I looked at the model and looked at the trending as far as what has happened over the last 10 years." PEX35 at 157; *see also* J.S.App.101. That percentage was necessary, she argued, because of comparatively low black turnout reflected in "the statistics that we're working with." PEX33 at 45. Delegates Spruill and Chris Jones, the plan sponsor, also identified in 2011 multiple recent defeats of minority-preferred candidates in majority-black districts, including House Districts HD74 and HD69, as the basis for drawing

55% BVAP districts. PEX32 at 23; PEX33 at 45; PEX35 at 41-42, 144-45.

No member of the Black Caucus either opposed the 55% BVAP target or disputed that "mostly every member of the Black Caucus" had input. J.S.App.101.

To be sure, two white Democratic delegates argued for BVAP reductions in majority-black districts to create minority influence districts. PEX35 at 64, 74, 79-80, 126-27. Delegate Spruill vehemently disagreed, observing that even districts with black majorities had not always performed. PEX35 at 144-45. The House responded to his speech with "Applause." *Id.* at 149. Delegate David Englin, a Democratic member from Alexandria, argued that "to suggest that Democrats voting for this plan are trying to harm minorities or not sufficiently standing up for minorities is an affront and an offense that is not borne out by the facts." Intervenors' Exhibit ("IEX") 4 at 12.

The plan passed with near-unanimous support from both political parties and the House Black Caucus. The Department of Justice Voting Rights Section precleared the plan.

B. In December 2014, residents (the "Plaintiffs") of the majority-black districts (the "Challenged Districts") brought this case under the Equal Protection Clause, alleging a single cause of action under the racial-gerrymandering theory first recognized in *Shaw v. Reno*, 509 U.S. 630 (1993). A three-judge district court convened pursuant to 28 U.S.C. §2284(a). The Virginia House of Delegates and its Speaker (collectively, the "House"), intervened and assumed responsibility for defending the plan.

1. In 2015, after a four-day trial, a divided district court ruled for the House. J.S.App.204. District Judges Robert Payne and Gerald Bruce Lee found no Fourteenth Amendment violation because the 55% BVAP goal did not conflict with the House's non-racial districting criteria, except in HD75. The majority found that district narrowly tailored under VRA §5 because the House had "'good reasons' for holding the BVAP in HD 75 just above 55% to ensure that the district *remained* a performing Section 5 district for minority-preferred candidates." J.S.App.311.

Circuit Judge Barbara Milano Keenan dissented, arguing that the 55% BVAP goal "establishes [racial] predominance as a matter of law." J.S.App.342.

2. This Court affirmed in part and vacated in part. *Bethune-Hill*, 137 S. Ct. at 802. It affirmed the lower court's judgment on HD75, concluding that "[r]edrawing this district presented a difficult task, and the result reflected the good-faith efforts of Delegate Jones and his colleagues to achieve an informed bipartisan consensus." *Id.* at 801. The Court, however, found two errors in the district court's predominance analysis: (1) it required Plaintiffs to establish "an actual conflict between the enacted plan and traditional redistricting principles," *id.* at 797-98, and (2) "it considered the legislature's racial motive only to the extent that the challengers identified deviations from traditional redistricting criteria that were attributable to race and not to some other factor," *id.* at 799-800.

The Court remanded. It instructed the lower court to consider whether predominance might be shown "in the absence of an actual conflict," *id.* at 799, and to

conduct a "holistic analysis" to "take account of the districtwide context," rather than "divorce any portion of the lines…from the rest of the district." *Id.* at 800. The lower court, it held, "must consider all of the lines of the district at issue." *Id.*

3. In October 2017, the district court conducted a second trial, and, on June 26, 2018, it issued a second split decision, this time concluding that race predominated in all 11 remaining Challenged Districts and that none was narrowly tailored. J.S.App.1.

Circuit Judge Keenan and District Judge Arenda Wright Allen (who replaced Judge Lee) predicated their predominance finding on several legal principles. First, the majority disregarded the House's evidence of high core retention in the Challenged Districts, concluding that "a district with 90% core retention still may have selected the remaining 10% of its population based exclusively on race." J.S.App.81-82. Second, the court disregarded the House's evidence of coordinated population movements in response to geographically lopsided population disparities in the Commonwealth, finding that information legally irrelevant under this Court's holding that an equal-population goal is "not one factor among others to be weighed" in the predominance inquiry, but rather "is part of the redistricting background, taken as a given." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015). J.S.App.80-81. Third, the majority opinion found it irrelevant whether or not a "district begins with a BVAP over 55%" or whether "particular district lines were…necessary to achieve the 55% figure." J.S.App.19.

The court then proceeded to credit Plaintiffs' expert and fact witnesses in every respect and discredit the House's expert and fact witnesses in every respect. While conceding "that the legislature relied on traditional districting criteria in making certain line-drawing decisions" and that there were "race-neutral explanations for specific district lines," J.S.App.82, the court neither discussed nor weighed any of them. It discussed only what it perceived to be the House's racial motives and found race predominant across the board. It emphasized that "the 11 remaining challenged districts in this case were inextricably intertwined" because some black residents were transferred from districts with higher BVAP (the court called these "donor" districts) to those with lower BVAP (the court identified these as recipient districts). J.S.App.83.

Turning to strict scrutiny, the court found that the use of one target, 55% BVAP, for all districts "strongly suggests that the legislature did not engage in narrow tailoring." J.S.App.87. The court then concluded from a racial polarized voting analysis by Plaintiffs' expert, Dr. Maxwell Palmer, that "a 55% BVAP was not required in any of the 11 remaining challenged districts" because lower BVAP levels would enable voters to elect Democratic Party candidates. J.S.App.90-93. The court also found it irrelevant that there was no evidence in 2011 to justify BVAP reductions under VRA §5's retrogression prohibition because "it is the intervenors' burden to justify their predominant use of race." J.S.App.95.

The court therefore found the 11 remaining Challenged Districts unconstitutional and enjoined their use in future elections. J.S.App.202.

Judge Payne dissented. J.S.App.98-201. He analyzed both the racial and race-neutral goals line by line, district by district, and concluded that race did not predominate in any of the Challenged Districts.

The House filed a timely notice of appeal. The House's standing to appeal is well established. *See, e.g.*, *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972); *Karcher v. May*, 484 U.S. 72, 77-83 (1987).

REASONS FOR NOTING PROBABLE JURISDICTION

The Court should note probable jurisdiction and reverse.

I. Race Was Not Predominant

A racial-gerrymandering plaintiff "bears the burden to show...that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Bethune-Hill*, 137 S. Ct. at 797 (quotations and edits omitted). "To satisfy this burden, the plaintiff must prove that the legislature subordinated traditional race-neutral districting principles to racial considerations." *Id.* (quotations omitted).

The district court's remand task was "to determine in the first instance the extent to which, under the proper legal standard, race directed the shape of these 11 districts." *Id.* at 800. This requires a "holistic analysis" of the 55% BVAP target's effect on "all of the lines of the district at issue." *Id.* at 800. "A holistic

analysis is necessary to give [the] evidence its proper weight." *Id.*

But the district court did not apply that holistic standard. It looked at only some lines, ignored others, weighed only race-related evidence, ignored all other evidence, and did not use "demanding" scrutiny, *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (quotations omitted), to distinguish run-of-the-mill VRA compliance from suspect racial sorting. The court's errors infected its analysis of each Challenged District.

A. The district court applied erroneous legal principles for assessing predominance and, as a result, failed to give the "evidence its proper weight." *Bethune-Hill*, 137 S. Ct. at 800.

1. The district court did not consider "all of the lines." *Id.* at 800. It disregarded all lines retained from the prior map and considered only those changed, even though it conceded this might omit 90% of each district from review. J.S.App.81-82. This overt rejection of this Court's plain-as-day command—all means *all*—was a different rendition of the court's initial error in considering only lines exhibiting "a deviation from, or conflict with, traditional redistricting principles." *Bethune-Hill*, 137 S. Ct. at 799. Both errors equally ignore "the district as a whole." *Id.* at 800. As *Bethune-Hill* explained, "any explanation for a particular portion of the lines...must take account of the districtwide context." *Id.* at 800. Because choices to move and retain constituents are made together in one process, reviewing the portions moved apart from those retained is a myopic analysis of decisions "in isolation." *Id.*

Moreover, the choice to retain residents, just as much as the choice to move them, is a legislative policy choice "to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Core retention is a traditional districting principle, *see Karcher v. Daggett*, 462 U.S. 725, 740 (1983), that other three-judge panels—in conflict with the decision below—have weighed heavily in the predominance inquiry, *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 590 (N.D. Ill. 2011); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 432 (S.D.N.Y.), *aff'd*, 543 U.S. 997 (2004); *Robertson v. Bartels*, 148 F. Supp. 2d 443, 454-56 (D.N.J. 2001).

The district court erroneously gave no weight to the "high degree of individual district core retention" in each Challenged District, IEX14 ¶¶76-79, and considered only between 18% and 38% of each district, i.e., the percentage changed, *see* IEX15 at 15. The fact witnesses testified that continuity was their priority in drawing the Challenged Districts. 2 Tr. 517:7-8, 695:6-9. And Dr. Palmer testified that, under his statistical analysis, the most predictive factor—more than race—of whether or not a voting district or "VTD" was included "in a challenged district" is "whether the VTD was in the benchmark version of the district." 2 Tr. 448:25-449:15. Thus, the court's district-by-district analysis erroneously ignored what all evidence identified as the predominant factor.

2. The district court erroneously disregarded the geographic location of population disparities in assessing population movements, J.S.App.81, even though that evidence may explain why a legislature

moved a district one direction and not another. For example, a legislature may move an underpopulated district east rather than west if its eastern neighboring district is overpopulated and its western neighboring district is underpopulated. And, if an underpopulated district borders a district at perfect population that, in turn, is bordered by an overpopulated district, the legislature may use the middle district as a funnel to achieve equality, removing perhaps thousands of residents from the middle district and replacing them with new residents, even though it was at equality. *See* J.S.App.148-49. Indeed, the geography of population loss and gain can result in highly complex maneuvering of dozens of districts in concert, creating a "ripple effect" spanning the state or moving circularly in regions.

These dynamics belong in a "holistic" inquiry because "[d]istricts share borders..., and a legislature may pursue a common redistricting policy toward multiple districts." *Bethune-Hill*, 137 S. Ct. at 800. Assessing districting moves apart from these dynamics is like second-guessing why a single square on a Rubik's cube is maneuvered without considering its connection to other squares.

Here, the district court made that mistake in viewing the Challenged Districts as an "inextricably intertwined" system of "donors" and recipients of black residents. J.S.App.83. That theory took the Challenged Districts in isolation, as if the House redistricted them separately from other districts. But the map-drawers actually viewed the districts as part of an integrated flow together with majority-white districts to address geographically lopsided population disparities—not

principally as donors or recipients of *black* residents. For example, a series of integrated moves brought excess population from Chesterfield County into the underpopulated Challenged Districts centered in downtown Richmond and excess population near Williamsburg into underpopulated Challenged Districts centered in Newport News and Hampton. Through those movements, so-called "donors" HD74, HD70, and HD95 were part of coordinated efforts to bring population to so-called recipients HD69, HD71, and HD92, which were underpopulated. Though these moves ultimately resulted in districts above 55% BVAP, numerous other avenues to that goal existed. *See infra* §I.A.3. The geographic limitations were more constraining and predominantly motivated the line-drawing.

The district court did not find otherwise. Rather, it erroneously read this Court's *Alabama* holding that "an equal population goal is not one factor among others to be weighed against the use of race," 135 S. Ct. at 1270, to render these dynamics legally irrelevant, J.S.App.81. But *Alabama* held only that the goal to equalize population alone says nothing about "*which* voters the legislature decides to choose" to move into or out of a district. 135 S. Ct. at 1271. In contrast, the geographic *location* of population disparities is central to that question. A "ripple effect" does not result merely from a population-equalization goal; it reflects motive to preserve district cores, compactness and contiguity, incumbencies, and communities of interest. This is because the alternative is to draw bizarre tentacles from underpopulated to overpopulated areas, bypassing intervening districts at perfect population—thereby sacrificing traditional criteria. Thus, in declining to

consider the legislature's solutions to geographic challenges, the court erroneously weighed only race and ignored these predominant factors.

3. The district court erroneously declined to consider whether or not districting decisions with racial impact were "necessary to achieve the 55% figure," J.S.App.19, and thus failed to link districting moves to "actual considerations that provided the essential basis for the lines drawn," *Bethune-Hill*, 137 S. Ct. at 792. As the United States argued in *Bethune-Hill*, assessing whether a racial target predominated means assessing how constraining it was in implementation; race does not predominate if "local demographics are such that any reasonably compact districts that respect political boundaries" meets the target or if "a racial target is but one factor." Brief for the United States, *Bethune-Hill v. Va. State Bd. of Elections*, 12-13 (No. 15-680) ("U.S. Br.").

In other words, residents are not evenly dispersed by race, and a mere disparate racial impact implies, at most, "being aware of racial considerations," not "being motivated by them." *Miller*, 515 U.S. at 916. If there were many ways to achieve a selected VRA-compliance target, non-racial goals dictated why one was chosen over others. By contrast, in cases like *Alabama*, where a majority-minority district saw the addition of "15,785 individuals" of whom "just 36 were white," 135 S. Ct. at 1271, the disparity in population movement suggests a severely constraining VRA compliance target necessitating laser-focused racial sorting.

But the district court imputed racial motive to all moves with racial impact, in spite of overwhelming evidence that the 55% BVAP target was supported by

local demographics and hardly constraining. Plaintiffs' expert, Dr. Jonathan Rodden, admitted that, "in most instances," there were "other ways to get" to 55% BVAP, 2 Tr. 162:24-163, J.S.App.112, which is unremarkable when 10 of the 11 Challenged Districts were near or above 55% BVAP prior to redistricting. Indeed, over 158,000 black voting-age persons living in the same cities and counties as the Challenged Districts were placed in majority-white districts, not in the Challenged Districts. PEX71 at 59-60. This was enough persons for four additional 55% BVAP districts.

Consequently, there are no "stark splits in the racial composition of populations moved into and out of" the Challenged Districts. *Bethune-Hill*, 137 S. Ct. at 800. The average BVAP of territory moved into the Challenged Districts was 47.85%; the average BVAP moved out was 41.7%. PEX50 Table 8. The BVAP of territory moved from majority-white districts to Challenged Districts was under 50% in 14 of the 16 such shifts. PEX71 at 60. Of the locality splits Plaintiffs' expert identified, over half (12 of 21) place territory of below 50% BVAP in Challenged Districts. PEX71 at 57-60.

Of the 24 VTDs split between a Challenged District and majority-white district, 13 placed territory of 50% or less BVAP into a Challenged District. PEX71 at 55. For example, the VTD splits between Challenged District HD63 and majority-white districts placed 3,800 black voters in majority-white districts and 2,895 black voters in HD63, PEX71 at 52; the splits between Challenged District HD89 and majority-white districts placed 8,300 black voters in majority-white districts and 1,938 black voters in HD89, PEX71 at 54; and the

splits between Challenged District HD80 and majority-white district HD79 placed 1,371 black voters in HD79 and 265 black voters in HD80, *id.* The plan placed 52,126 black voters in Virginia Beach in majority-white districts and 11,051 in Challenged District HD90, PEX71 at 59; it placed 9,914 black voters in split Richmond "unincorporated places" in majority-white districts and 9,038 in Challenged Districts, PEX71 at 58; it placed 2,389 black voters in Hopewell in majority-white HD62 and 3,395 in majority-black HD63, PEX71 at 57.

Over 45% of black voters in Chesapeake, 43% of black voters in Suffolk, 28% of black voters in Portsmouth, and 27% of black voters in Norfolk were placed in majority-white districts. PEX71 at 59. While many black residents did end up in Challenged Districts, the demographics did not require racially predominant redistricting to preserve districts at 55% BVAP. The target was not constraining; other criteria predominated.

Ignoring all this, the district court emphasized that territory split between a Challenged District and non-challenged district typically "allocated to challenged districts...a higher BVAP percentage than the portions allocated to non-challenged districts." J.S.App.24 (quotations omitted). But that is hardly surprising or meaningful when the state intentionally drew VRA districts. Unless VRA compliance is inherently suspect, the inquiry must be into the *degree* of difference and constraint. The court ignored that factor and the overwhelming evidence against predominance.

4. The district court did not apply a "demanding" standard. *Easley*, 532 U.S. at 241. To the extent its

findings are even near accurate, it simply described ordinary VRA compliance, which is not inherently suspect.

In entertaining this case two terms ago, this Court had the opportunity to find VRA compliance presumptively unconstitutional, since it was then clear "that the 55% BVAP figure was used in structuring the districts." *Bethune-Hill*, 137 S. Ct. at 795 (quotations omitted). In calling instead for a "holistic" analysis, the Court drew a distinction between ordinary VRA compliance and suspect racial predominance. As the United States observed in *Bethune-Hill*, "traditional districting principles are embedded in the VRA's standards," U.S. Br. at 14 n.4, so the VRA does not ordinarily require subordinating neutral goals to race. Accordingly, the predominance test must be geared towards identifying those unusual cases where "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," *Miller*, 515 U.S. at 913, not merely towards describing VRA compliance.

The district court's opinion, however, is simply a drawn-out way of saying "that the 55% BVAP figure was used in structuring the districts." In finding that BVAP is normally higher in VRA districts than majority-white districts, that there is a correlation between a precinct's racial composition and its likelihood of placement in a VRA district, and that BVAP dropped in Challenged Districts with higher BVAP (i.e., potentially "packed" districts) and rose in Challenged Districts with lower BVAP (i.e., potentially "cracked" districts), the district court identified evidence present in virtually all jurisdictions that face

VRA issues. By subjecting the House's plan to strict scrutiny, the district court's decision renders every majority-minority district in the nation presumptively unconstitutional. That is the rule *Bethune-Hill* rejected.

B. The district court committed clear error in weighing the evidence. It is implausible that every House fact witness was dishonest, that every House expert used bad methodology, that race predominated in every Challenged District, and that no Challenged District needed to be above 55% BVAP under VRA §5—and, at the same time, that every fact witness for Plaintiffs was honest and accurate, every expert witness for Plaintiffs used reliable methodology, and every factual inference was in their favor. In other words, the district court spurned a "holistic" analysis weighing the "race-neutral explanations for specific district lines" it conceded exist, J.S.App.82, considered only racial explanations, and transparently attempted to shield its one-sided conclusions from review by labeling them findings of fact and credibility. That is paradigmatic clear error.

In exceptional case like this, it is "definite" that "a mistake has been committed." *Easley*, 532 U.S. at 242 (quotations omitted). And, while this Court "will not lightly overturn the concurrent findings of the two lower courts," here "there is no intermediate court, and [this Court is] the only court of review." *Id.* at 242-43.

1. The district court erred in its treatment of expert testimony.

Most obviously, it erroneously relied on expert analysis it previously rejected by a unanimous vote.

Plaintiffs' expert at the first trial, Dr. Ansolabehere, prepared a statistical analysis concluding that a VTD's racial composition is a better predictor than its political composition of its likelihood of being included in a Challenged District. But the district court rejected it because of technical flaws and because the analysis failed to account for traditional districting criteria to be weighed against racial goals. J.S.App.296. Judge Keenan's dissent "agree[d] with the majority's criticism of Dr. Ansolabehere" on this basis. J.S.App.355 n.48. But the second opinion relied heavily on the same analysis and a materially identical one by Dr. Palmer, which also did not account for traditional criteria. J.S.App.20-25. The court's diametrically contradictory conclusion conflicts with its prior opinion and the three-judge panel decision in *Backus v. South Carolina*, 857 F. Supp. 2d 553, 565 (D.S.C. 2012), which rejected a similar analysis. It is clear error and violates the law of the case doctrine. *See, e.g., United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987); J.S.App.117-120.[1] Further, these analyses included HD75, the district this Court upheld, in their calculations, which skewed the result.

Additionally, the court erred in admitting, crediting, and relying heavily upon so-called expert testimony amounting to "subjective belief" and "speculation," not reliable methodology. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993). Dr. Rodden created "dot-density" maps purporting to show racial demographics

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[1] The sole traditional criterion these analyses accounted for was core retention, and, as discussed above, they identified core retention as more predictive than race.

by representing white residents with white dots and black residents with black dots. His report and testimony consisted of his interpretation of those dots. But his "methodology" was nothing but a "visual walkthrough" of the maps and "personal opinions and speculation" about legislative motive with color-commentary. *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014); *United States v. Brewer*, 783 F.2d 841, 843 (9th Cir. 1986) (finding expert testimony unnecessary to view photographs because a factfinder can assess what a picture depicts). His "I-know-it-when-I-see-it" approach, *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1106-07 (7th Cir. 1994), did not involve an itemized set of metrics he considered or any indication of how he measured them or how each compares across a consistent data set. He instead discussed criteria ad hoc, randomly stating, for example, that HD70 is "quite non-compact" without a measurement, PEX69 at 30, or assessing other districts' compactness. He offered a journalistic narrative about motive and credibility—a topic beyond the competency of expert testimony, *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 546-47 (S.D.N.Y. 2004); *United States v. Hill*, 749 F.3d 1250, 1260 (10th Cir. 2014)—not methodologically sound conclusions.

And those few opinions amenable to objective review were debunked. Dr. Rodden's report stated that "[i]t is not possible to draw five districts that meet the 55 percent target without including the African-American section of Hopewell," PEX69 at 11, but John Morgan, the House's map-drawing consultant, created an alternative plan doing just that, 2 Tr. 712:9-713:1. Similarly, it took Mr. Morgan ten minutes to draw four

alternative configurations of HD95 all exceeding the 55% BVAP target and directly refuting Dr. Rodden's contention that it could only exceed 55% in the configuration the legislature chose. 2 Tr. 686:5-18. Dr. Rodden eventually conceded these errors, *see* J.S.App.114-15, and retreated to the position that "if it's possible to achieve 55 percent without" the selected configuration then "that's stronger evidence of racial predominance" because the legislature "did it anyway." 2 Tr. 352:20-24. But "anyway" connotes non-racial reasons. Besides, Dr. Rodden was offered as an expert to provide a reliable methodology, not an attorney to advocate the legal conclusion of predominance, which is not a measurable social-science concept. J.S.App.109-114.

Dr. Rodden's presentation was, in addition, an erroneous way to assess legislative motive because map-drawers do not look at dots when they redistrict, so Dr. Rodden's pictures did not reflect what anyone saw or thought in the 2011 redistricting. The dots in Dr. Rodden's map are placed randomly within census blocks, and he omitted the block lines, leaving it a mystery how far each dot is from the residents it purports to signify. And Dr. Rodden provided no corresponding numerical data, so only by eyeballing the maps can one guess how many individuals are represented in any space. 2 Tr. 329:17-18. But map-drawers build districts with census blocks and numbers, not by grabbing isolated individuals or dots, so Dr. Rodden's method did not reverse engineer any actual motive.

2. The district court erred in transparently attempting to "insulate [its] findings from review by

denominating them credibility determinations." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575-76 (1985). The House sponsored extensive testimony in both 2015 and 2017 from Delegate Chris Jones, the principal architect of the plan, and in 2017 from John Morgan, the consultant assisting Delegate Jones. They testified at length regarding redistricting motive, and their testimony was highly probative to the "actual considerations" for district lines. *Bethune-Hill*, 137 S. Ct. at 799. The district court did not weigh these considerations holistically; it ignored them, finding neither witness believable—even though the court's first opinion credited Delegate Jones and his testimony formed the basis of this Court's initial decision. *See id.* at 797. The court's determinations are "founded on factual inferences that the evidence did not permit." *Doe v. Menefee*, 391 F.3d 147, 164 (2d Cir. 2004) (Sotomayor, J.).

The court discredited Mr. Morgan principally because he was not called in the first trial. J.S.App.32-33. But, because a witness does not choose when to be called, that timing is irrelevant to his credibility.[2] The court also perceived conflicts between Mr. Morgan's testimony and Dr. Rodden's, but, as discussed, the latter's testimony should never have been credited—or even admitted. J.S.App.105. The court, in addition, found that Mr. Morgan could not have been accurate in saying he had election-return data at the census-block

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[2] Mr. Morgan was called at the second trial because only then had this Court ordered an examination of "all of the lines" and only then had Plaintiffs presented Dr. Rodden's extensive speculation at the lowest levels of geography, calling for a rebuttal at that level. J.S.App.103.

level when it is reported at the VTD level. J.S.App.34-35. But Mr. Morgan did not claim that he had data to identify, on a political basis, where to split VTDs, but simply that he coded all census blocks in a VTD with the same political data—which all trial experts admitted is possible—and tried to place as little of a VTD as possible in a district where that political makeup would be disadvantageous. J.S.App.106-07. Nothing in the record conflicted with this testimony, and Dr. Rodden agreed that consultants use political data at the block level in that manner. 2 Tr. 957:6-12.

Likewise, the district court discredited Delegate Jones because of small discrepancies between his testimony in 2015 and 2017. J.S.App.35-36. For example, Delegate Jones testified in 2015 that he believed a portion of HD89 included a small business owned by the incumbent when, in fact, one location of that business was just on the other side of the street and another was in a different section of the district. Similarly, he testified in 2015 that an odd contortion in HD63 was intended to exclude a potential primary opponent to the incumbent, when the incumbent testified in 2017 that it was to include a constituent she wanted in her district. These and similar discrepancies were immaterial, unrelated to racial considerations, and hardly the basis to discredit the entirety of Delegate Jones's testimony.

The district court also found Delegate Jones's testimony that Black Caucus members had input in the plan to conflict with the testimony of Black Caucus member witnesses who claimed in 2017 they had no input in the redistricting. J.S.App.36-37. But dispositive video evidence corroborates Delegate Jones.

Video-recorded speeches on the floor in 2011 state that "mostly every member of the Black Caucus" was consulted. PEX35 at 142, 146–47.[3] All Black Caucus trial witnesses were present then. None rose to refute this representation. Crediting their testimony over Jones's was clear error. *See Anderson*, 470 U.S. at 575 (stating that credibility determinations are vulnerable where "[d]ocuments or objective evidence…contradict the witness' story"); *see also Menefee*, 391 F.3d at 164; *Matter of Complaint of Luhr Bros., Inc.*, 157 F.3d 333, 339-43 (5th Cir. 1998); *Ray v. Clements*, 700 F.3d 993, 1016-17 (7th Cir. 2012); *Bishopp v. District of Columbia*, 788 F.2d 781, 785-86 (D.C. Cir. 1986).

II. The Challenged Districts Are Narrowly Tailored

The district court erred in finding none of the Challenged Districts narrowly tailored under VRA §5. A district is narrowly tailored "when the legislature has good reasons to believe it must use race in order to satisfy the Voting Rights Act." *Bethune-Hill*, 137 S. Ct. at 801 (quotations omitted).

Virginia was a VRA §4 covered jurisdiction and its redistricting plan was required to be precleared judicially or administratively under VRA §5. *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 323 (2000). Unlike VRA §2—which applies nationwide and requires minority-opportunity districts only if "preconditions," including racially polarized voting, are proven, *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017)—VRA §5

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[3] House members in 2011 understood they were creating a court record. PEX35 at 142-43; PEX40 at 34.

applied only where Congress had "reliable evidence of actual voting discrimination," *South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966), to justify shifting the burden to the state to prove "the absence of backsliding," *Reno*, 528 U.S. at 335. So, unlike jurisdictions that can safely ignore race absent "good reasons" to fear the §2 preconditions might be proven, *Cooper*, 137 S. Ct. at 1470, §5's preconditions applied in Virginia by operation of law. Its plan was presumptively retrogressive unless proven otherwise.

It is undisputed that the 2001 House plan, the "status quo" benchmark, *Reno*, 528 U.S. at 323, contained 12 ability-to-elect districts, and BVAP levels in 11 of 12 of those were near or above 55%. Legally bound to ensure the absence of retrogression, Virginia had to use race in "structuring the districts." *Bethune-Hill*, 137 S. Ct. at 795 (quotations omitted).

Virginia's options to accomplish that compelling state interest, *see League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring), were limited because Congress amended §5 in 2006 to tighten the preclearance prerequisites. The amendment reversed this Court's decision in *Georgia v. Ashcroft*, which had held that §5 could be satisfied by "influence districts"—"where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." 539 U.S. 461, 482 (2003). According to the majority, "a State may choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice," or "a State may choose to create a greater number of districts in which it is

likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice." *Id.* at 480. Because "[e]ither option will present the minority group with its own array of electoral risks and benefits," "Section 5 does not dictate that a State must pick one of these methods of redistricting over another." 539 U.S. at 480 (quotations omitted).

But, in reversing the *Ashcroft* decision, Congress "adopted the views of the dissent" of Justices Souter, Stevens, Ginsburg, and Breyer. *Alabama*, 135 S. Ct. at 1273. While observing that not all "shifts from majority-minority to coalition districts" are retrogressive, that opinion contended that a state choosing that shift "bears the burden of proving that nonminority voters will reliably vote along with the majority." *Ashcroft*, 539 U.S. at 492 (Souter, J., dissenting). "If the State's evidence fails to convince a factfinder that high racial polarization in voting is unlikely, or that high white crossover voting is likely, or that other political and demographic facts point to probable minority effectiveness, a reduction in supermajority districts must be treated as potentially and fatally retrogressive, the burden of persuasion always being on the State." 539 U.S. at 493. Accordingly, it concluded BVAP reductions towards 50% are retrogressive without persuasive proof of "the absence of racially polarized voting." *Id.* at 500 n.3.

By act of Congress, that view became the law and bound Virginia in 2011.[4]

A. Safe Districts Around or Above 55% BVAP Are Narrowly Tailored

The district court concluded that the Challenged Districts are racial gerrymanders because they are safe districts around or above 55% BVAP and not influence districts around or below 50% BVAP. J.S.App.90-94. But only by ignoring §5 altogether could the court conclude that Virginia lacked "good reasons" to do exactly what the *Ashcroft* majority said is permitted and exactly what the now-controlling *Ashcroft* dissent said is required. The court did not address §5's presumptions that voting is polarized, that "super-majority" districts must be maintained, and that, if nothing else, a state has discretion to draw "safe" districts. Its analysis is riddled with legal and factual error.

1. The district court first ignored the point of agreement among all *Ashcroft* opinions that "a State may choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice." 539 U.S. at 480-81. Thus, while *Ashcroft* "gave

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[4] Although the Court has since concluded that Virginia and other jurisdictions were subjects of an unconstitutional coverage formula, *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 550 (2013), compliance was a compelling interest in 2011, *see Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016). To the extent members of this Court believe the VRA is flawed or has been incorrectly interpreted, Virginia "is not the one that is culpable." *Alabama*, 135 S. Ct. at 1288 (Thomas, J., dissenting).

States flexibility in determining the percentage of black voters in each districts," *Alabama*, 135 S. Ct. at 1286 (Thomas, J., dissenting), the district court assumed that safe districts would be insufficiently tailored if influence districts could have performed. J.S.App.90-94. But, where there are multiple legitimate avenues to VRA compliance, the narrow-tailoring inquiry must account for that flexibility and deem race-based measures tailored so long as they are appropriate to the ultimate end. Otherwise, no means could ever be narrowly tailored: one means would prove another unnecessary and vice versa.

The question is therefore not whether Virginia could have satisfied the VRA differently, but whether the method it chose was "beyond what was reasonably necessary." *Shaw v. Hunt*, 517 U.S. 899, 912 (1996). In that respect, this case is unlike those in which states have taken action unrelated to the VRA—such as creating a new ability-to-elect district where §5 preserves only the status quo, *id.*, or maintaining minority VAP rigidly at levels exceeding 70% when a 65% minority VAP would not affect electoral outcomes, *Alabama*, 135 S. Ct. at 1273. Here, by contrast, the House chose one compliance method (12 "safe" seats) over another (a higher number of influence seats). In finding this choice insufficiently tailored, the district court denied that states are "permitted to make judgments about how best to prevent retrogression." *Alabama*, 135 S. Ct. at 1286 (Thomas, J., dissenting). No Justice in *Ashcroft* took that view.

Furthermore, the district court did not identify a means of complying with §5 "without using racial classifications." *Fisher v. Univ. of Texas at Austin*, 570

U.S. 297, 312 (2013). Instead, the court faulted the House for not drawing districts at lower BVAP levels. But lower BVAP does not signify less attention to race. As Justice Kennedy observed in his *Ashcroft* concurrence, 539 U.S. at 491-92, and the Court held in *Bartlett v. Strickland*, 556 U.S. 1, 22 (2009), drawing minority influence districts is no less race-based than drawing majority-minority districts. In fact, *Bartlett* rejected a reading of VRA §2 that would require influence districts because that requirement would "unnecessarily infuse race into virtually every redistricting" and place the statute in constitutional doubt. 556 U.S. at 21.

So this is not a case where one avenue towards a compelling interest is insufficiently tailored because a race-neutral avenue is available. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986). The court instead deemed one avenue insufficiently tailored by identifying an equally—if not more—race-conscious avenue. That is illogical and legally baseless.

It also infuses an illogical gloss onto the Fourteenth Amendment, which does not pick one set of "electoral risks and benefits" over another any more than the VRA does. *Ashcroft*, 539 U.S. at 480 (quotations omitted). In 2011, the Virginia House made a deliberate, well-reasoned choice on this question. Delegates Spruill, Dance, and Jones argued for safe 55% BVAP seats, and two other delegates advocated for BVAP reductions to create influence seats. PEX35 at 100-141; PEX35 at 161-64. None of the trial witnesses spoke on the floor urging BVAP reductions. The House, including all trial witnesses, instead voted for 12 "safe" districts.

That was not a choice to deny equal protection over a choice to afford it. Nor was it a choice to wade into an area of suspect classifications over a choice to avoid them altogether. Rather, faced with the federal-law imperative to preserve minority representation—against a presumption of retrogression—the House made a legitimate "political decision" regarding the "effective exercise of the franchise" as to which there may be "an infinite number" of alternatives. *Holder v. Hall*, 512 U.S. 874, 898, 900 (1994) (Thomas, J., concurring). This case is about coopting the federal courts to reverse that informed political decision and hand a political victory to the small minority of delegates who had differing political goals. Whether or not that is "beyond the ordinary sphere of federal judges" to do under the VRA, *id.* at 901, it surely is not appropriate under the Equal Protection Clause, which does not define an ideal form of minority representation.

Rather, the equal-protection question is whether a less race-conscious avenue to satisfy §5 was available. One was not.

2. Indeed, the House's choice was legally restricted because the §5 amendment tilted the scales in favor of safe districts. Because the benchmark plan contained 12 ability-to-elect districts, the Virginia House had the choice either (1) to draw 12 ability-to-elect districts with sufficient BVAP to elect black-preferred candidates without white crossover votes or (2) "to prove the absence of racially polarized voting" to justify BVAP reductions. *Ashcroft*, 539 U.S. at 500 n.3 (Souter, J., dissenting).

The latter showing would have required "competent, comprehensive information regarding white crossover voting or levels of polarization in individual districts across the State," *id.* at 500 (quotations omitted), which Virginia did not have and could not have obtained. There are too few House of Delegates contested elections to perform that analysis. 1 Tr. 761:1-15. Nor is it possible to assess whether black registration is on par with white registration because voter registration and turnout records in Virginia do not reference race. 1 Tr. 727:3-10. And the Virginia Assembly holds odd-year elections that have different voting patterns from even-year elections, rendering data from congressional and presidential elections unhelpful in assessing voting patterns. 1 Tr. 516:2-19. Faced with the burden of disproving polarized voting—and the shortest time frame of any state to redistrict—the House would have walked into a preclearance proceeding empty-handed, hoping the Voting Rights Section or District of Columbia District Court would simply assume BVAP reductions to be non-retrogressive. That assumption was legally untenable.

Thus, §5 required 12 safe districts. And that is all the more obvious because the Black Caucus members without exception in 2011 supported districts of 55% BVAP or higher. Delegate Dance represented that she "looked at the model and looked at the trending as far as what has happened over the last 10 years," that black turnout was disproportionately low, and that she supported the plan because "it does provide the 55 percent voting strength that I was concerned about." PEX35 at 137. Delegate Spruill represented on the House floor that "mostly every member of the Black Caucus" was consulted, along with NAACP leaders in

Suffolk, Chesapeake, and Virginia Beach, and that they supported 55% districts in light of concerns specific to their districts and regions. PEX35 at 142, 146-47. No Black Caucus member disputed this in 2011. This meant, not only that the House had good reasons to draw safe districts under the §5 "effect" element, but also that it had good reasons to honor the Black Caucus members' input under the §5 "intent" element, under which Virginia had to prove the *absence* of discriminatory intent.

Moreover, the House had evidence specific to each district and region, similar to the evidence this Court found to justify a 55% BVAP in HD75. *See Bethune-Hill*, 137 S. Ct. at 799-802. For example, Delegate Dance told the House that black turnout in Petersburg, the population center of her district, HD63, was disproportionately low. PEX33 at 45. Delegate Spruill expressed concern that, in 2005 and 2009 elections in HD74 and HD69, the minority community failed to elect its preferred candidates when white delegates defeated multiple black delegates in multi-way primaries, which split the black vote, 1 Tr. 457:19–458:5; PEX35 at 144-45, and he had extensive input in the South Hampton Roads Challenged Districts, his home region. The delegates were also aware of minority-preferred-candidate losses in recent memory in other districts, including HD63 and HD90. Additionally, the delegates discussed HD71, observing that, although incumbent member Jennifer McClellan likely did not need 55% BVAP for reelection, a future candidate in an open race would not have her incumbency advantage and would face an electoral uphill battle, especially given the BVAP plummet over the decade from over 55% BVAP to about 46% BVAP.

IEX15 at 13; 2 Tr. 698:22-25. The House, furthermore, had the benefit of a polarized voting analysis created during the prior redistricting cycle's litigation, and that report concluded that "voting for the Virginia legislature has customarily been marked by racial polarization" and that, accordingly, "districts 55% to 62% in black VAP cannot be considered packed." IEX103 Ex. A at 16, 23, 36, 43. All of this evidence weighed heavily against crossover districts and supported districts of 55% BVAP or higher.

Thus, because uncertainty under the amended statute cut against—and the Black Caucus uniformly advocated against—BVAP reductions, the House had every reason to believe they would be retrogressive and no way to prove otherwise. The House had impeccable reasons to draw safe districts.

B. The District Court's Analysis Erroneously Focuses on Optics, Not §5's Requirements

By ignoring §5's substantive requirements, the district court found the Challenged Districts insufficiently tailored without finding either that the House's VRA efforts were "quite far removed" from the statute, *Miller*, 515 U.S. at 926, or that race-blind means of §5 compliance were available, *Fisher*, 570 U.S. at 312. The court instead focused on peripherals and faulted the House for not undertaking busywork exercises that were useless, superficial, or impossible.

1. The court complained that Delegate Jones did not "compile" "recent election results," information on "the 2011 state Senate map," and "other plans that were precleared or rejected by the Department of Justice." J.S.App.88. But the 2011 state Senate map

was neither created nor precleared when the House was redistricting, and no "other plans" would be of use because no 2010-cycle plans existed and the 2006 amendments did not apply in prior cycles. Besides, this information is irrelevant to prove the "the absence of racially polarized voting" in Virginia. *Ashcroft*, 539 U.S. at 500 n.3 (Souter, J., dissenting). In addition, that Delegate Jones did not "compile" election results was irrelevant when he and his colleagues were aware of them. 1 Tr. 462:9-11. The district court wrongly invalidated the Challenged Districts for the House's failure to "compile a comprehensive administrative record," which is not required. *Bethune-Hill*, 137 S. Ct. at 802 (quotations omitted).

Importantly, this is not like a case where a state claiming a compelling interest in remedying the effects of prior discrimination must make "findings" to justify that goal. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989). Congress and the Department of Justice made the controlling findings in setting and applying the §4 coverage formula, *Katzenbach*, 383 U.S. at 329, and Virginia could reasonably rely on Congress's determination, *Harris*, 136 S. Ct. at 1310; *see also Croson*, 488 U.S. at 491 ("Congress may authorize, pursuant to section 5 [of the Fourteenth Amendment], state action that would be foreclosed to the states acting alone") (quotations omitted). Because §5 presumed Virginia's redistricting plan would be retrogressive, Virginia had no reason to gather evidence to re-prove Congress's findings before using racial data to avoid the "backsliding" §5 prohibited. *Reno*, 528 U.S. at 875.

2. The district court's contention that narrow tailoring required different BVAP goals for each district similarly faults the House for paying insufficient attention to cosmetics. J.S.App.88. Every district is subject to a majority-vote requirement, and the House had proof of crossover voting in none of them. The number 55% is the lowest number available to create "supermajority" districts. *Ashcroft*, 539 U.S. at 493 (Souter, J., dissenting). Large BVAP drops below 55% would plainly have been retrogressive: the *Ashcroft* dissent would have denied preclearance to districts in the Georgia Senate's redistricting plan that dropped, respectively, from 60.58% to 50.31% BVAP, from 55.43% to 50.66% BVAP, and from 62.45% to 50.80% BVAP. 539 U.S. at 472-73. And small differences are not functionally significant because data is imprecise and election prediction is inherently speculative. *See* Amicus Brief of Political Scientists Thomas L. Brunell et al., *Bethune-Hill v. Va. State. Bd. of Elections*, 14-28 (15-680). Arriving at, say, 54% for one district and 57% for its neighbor would not carry any electoral significance and, if anything, would be more race-conscious by infusing every redistricting move with the concern for achieving some ideal golden mean. *Cf. Bartlett*, 556 U.S. at 21-22.

Further, the 55% BVAP target operated to keep the districts away from extremes. According to the court's findings, districts with high BVAPs over 60% saw BVAP drops and districts with the lowest BVAPs saw modest increases. J.S.App.83. This was not a "mechanical" rule forbidding even small BVAP drops with no likely effect on election outcomes. *Alabama*, 135 S. Ct. at 1267. The rule was tailored to avoid the twin evils of "cracking" and "packing."

3. The court erroneously concluded that the House could have satisfied its burden with a polarized-voting analysis like the one Plaintiffs' expert, Dr. Palmer, presented in the 2017 trial. J.S.App.90-95. Setting aside the court's erroneous assumption that the House was legally required to try to preclear influence districts if possible, Dr. Palmer's analysis could not have justified influence districts even had the House wanted them. That is plain because Souter's *Ashcroft* dissent and the district-court opinion it would have affirmed rejected a materially identical one that focused "on statistics about…Democrats," not minority voting strength. 539 U.S. at 507-08 (Souter, J., dissenting).

Dr. Palmer's analysis considered only "endogenous" general-election results from the 2008 presidential race between Barack Obama and John McCain and the 2009 statewide gubernatorial race, and Dr. Palmer averaged that data before reaching his ultimate conclusion about minority ability to elect. According to the now-controlling *Ashcroft* dissent, that does not prove non-retrogression because "the minority group may well have no impact whatever on which Democratic candidate is selected to run." 539 U.S. at 507-08. Justice Souter also rejected evidence on statewide elections as insufficient because those races have minimal bearing on the results in specific legislative districts, *id.*, and federal even-year presidential data—which is useless for Virginia House candidates, 2 Tr. 909:10-16, and involved Barack Obama, a "political superstar[]" whose success "hardly proves" what is needed for black-supported candidates to win House races, *see, e.g.*, *Nipper v. Chiles*, 795 F. Supp. 1525, 1535 n.8 (M.D. Fla. 1992); *Nipper v. Smith*, 39

F.3d 1494, 1505 n.2, 1547 (11th Cir. 1994)—are even less relevant. Conducting Dr. Palmer's analysis in 2011 would have been yet another useless exercise.

What's more, Dr. Palmer's analysis shows racially polarized voting in Challenged Districts in the 2009 gubernatorial race. PEX71 at 48; 2 Tr. 451:5-452:4. Presenting evidence of polarized voting would not "prove the *absence* of racially polarized voting." *Ashcroft*, 539 U.S. at 550 n.3 (emphasis added). Dr. Palmer only concluded that 55% BVAP was not "necessary" by averaging statewide results with even-year elections involving Barack Obama. That trick would not have satisfied Virginia's preclearance requirement in 2011.

4. As discussed above, the court erroneously discredited Delegate Jones's testimony that the House relied on Black Caucus members' knowledge of their own districts and advocacy in support of at least 55% BVAP in each. Besides conflicting with contemporaneous video evidence showing that "mostly every member of the Black Caucus" was consulted, that district-specific concerns supported the 55% BVAP figure, and that Delegate Dance personally "looked at the model and looked at the trending" in assessing turnout and demographics, PEX35 at 41, 142, 146-47, 157, PEX33 at 45, the court's findings are legally wrong because the evidence before the House in 2011 is the legally relevant information. The House could rely only on what the Black Caucus members said in 2011, not on their directly contradictory statements in 2017. Members were entitled to trust their colleagues and did not have to account for the possibility that, six years later, they would change their stories.

Similarly, the trial witnesses' 2017 testimony against the 55% BVAP target was not before the Department of Justice in the 2011 preclearance process. In preclearance, Voting Rights Section staff interview individuals in local communities to collect information regarding proposed changes to voting methods, the basis for the proposals, and the anticipated effects. Publicly available documents produced under the Freedom of Information Act reveal strong support for the 55% BVAP target, including representations to the Department of Justice that "members of the Black Caucus were 'tickled pink' with the proposed plan." J.S.App.365. While that information could not be introduced into evidence because of Department of Justice redactions, *see* Fed. R. Evid. 106, the Court should refer this issue to the Solicitor General to ascertain whether any opposition to the 55% BVAP target was expressed in the preclearance process, including by individuals who testified at trial.

CONCLUSION

The Court should note probable jurisdiction and reverse.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:14cv852

[Filed June 26, 2018]

GOLDEN BETHUNE-HILL, *et al.*,
Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,
Defendants.

MEMORANDUM OPINION

BARBARA MILANO KEENAN, Circuit Judge:

The plaintiffs, 12 Virginia registered voters, filed this civil action in 2014, alleging racial gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment. Dkt. No. 1; Am. Compl. ¶¶ 1, 7-18. They contend that the Virginia General Assembly (the legislature) predominantly relied on race in constructing 12 majority-black Virginia House of Delegates districts during the 2011 redistricting cycle. Am. Compl. ¶¶ 1-2. According to the plaintiffs, the legislature required each of these districts to achieve a minimum 55% black voting age population (BVAP),

which BVAP requirement was not necessary for black voters to elect their preferred candidates under the mandate of the Voting Rights Act of 1965 (VRA), 52 U.S.C. § 10101 through § 10702. Am. Compl. ¶¶ 2-3; 1st Trial Tr. at 5.

After holding a bench trial in 2015, this Court issued a divided opinion upholding the redistricting plan. *See Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015). The United States Supreme Court affirmed this Court's decision regarding one district, but remanded for reconsideration of the question whether race was used as the predominant factor in drawing the 11 remaining districts. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017). After a second trial, and upon our consideration of the evidence presented at both trials, we hold that the plaintiffs have shown through telling direct and circumstantial evidence that race predominated over traditional districting factors in the construction of the 11 remaining challenged districts. We further hold that the intervenors have not satisfied their burden to show that the legislature's use of race was narrowly tailored to achieve the compelling state interest of compliance with Section 5 of the VRA, 52 U.S.C. § 10304.

I.

We begin with an overview of the procedural history of this case.[1] Following the 2010 decennial census, the

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[1] For purposes of Part I of this opinion, we take many of our facts from the Supreme Court's opinion in *Bethune-Hill*, 137 S. Ct. 788. We also use the "*id.*" short form in reference to legal citations only.

legislature redrew the 100 Virginia House of Delegates districts to take effect beginning with the 2011 election cycle.[2] *Bethune-Hill*, 137 S. Ct. at 795; *see* Pl. Ex. 65. Delegate Steven Christopher Jones[3] was the chief patron of House Bill 5005, which set forth the re-drawn districts (the 2011 plan, or the 2011 map). Pl. Ex. 48 at 10-12; 1st Trial Tr. at 316, 376-77, 395.

Jones was the chair of the House Committee on Privileges and Elections, and coordinated public meetings throughout the state regarding the 2011 redistricting process. Pl. Ex. 48 at 3, 6; 2nd Trial Tr. at 112. In this role, Jones also was the primary architect of the 2011 plan. 1st Trial Tr. at 397. To construct the map, Jones and others used "Maptitude" software to move census blocks and voting tabulation districts (VTDs) in and out of the proposed House of Delegates districts.[4] 1st Trial Tr. at 274; 2nd Trial Tr. at 36, 61. Maptitude reflected the demographic changes in each district resulting from the alterations of proposed boundary lines. 1st Trial Tr. at 40. The software also

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[2] Elections for the Virginia House of Delegates, as well as Virginia statewide offices, are held in odd-numbered years. 1st Trial Tr. at 276.

[3] Jones represented District 76, which is not at issue in this case. 1st Trial Tr. at 331, 764.

[4] A VTD is sometimes referred to colloquially as a voting "precinct." 1st Trial Tr. at 8; 2nd Trial Tr. at 164. VTDs are the smallest unit at which election data is collected and reported by the Virginia Department of Elections. 2nd Trial Tr. at 371-72. VTDs are composed of "census blocks," geographical units at which data from the federal census is reported. Pl. Ex. 69 at 7; 2nd Trial Tr. at 372.

was available for the use of other legislators on computers located in the legislature's Division of Legislative Services office. 1st Trial Tr. at 33, 40, 420, 444.

To achieve population equality among the districts as required by the United States Constitution, the legislature determined that each House of Delegates district was required to have 80,000 residents, with a maximum population deviation of plus or minus one percent.[5] Pl. Ex. 16 at 1; 1st Trial Tr. at 29, 70; *see also Bethune-Hill*, 137 S. Ct. at 795. Both the 2001 and 2011 districting plans included 12 districts in which black residents constituted a majority of the districts' voting-age population (the majority-minority districts, or the challenged districts).[6] *Bethune-Hill*, 137 S. Ct. at 795. These districts were located in four distinct areas of the state: the greater Richmond/Tri-City region, the Southside area located along the North Carolina border, North Hampton Roads (the peninsula), including the cities of Newport News and Hampton, and, finally, South Hampton Roads, including the cities of Norfolk, Chesapeake, and surrounding areas. Pl. Ex. 50 at 69; Pl. Ex. 69 at 9, 41; DI Ex. 94; 1st Trial Tr. at 319. At the time of the 2010 census, the BVAP levels in the 12 majority-minority districts ranged from

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[5] For ease of reference, we will calculate the extent of each district's over-, under-, or equal population by reference to the 80,000-person population requirement, not including the plus or minus one percent allowable deviation.

[6] As discussed further below, by the time of the 2010 census, the BVAP in one of the majority-minority districts had fallen below 50%. *See* Pl. Ex. 50 at 72.

between 46.3% and 62.7%. *Id.*; Pl. Ex. 50 at 72. Because most of the 12 districts were underpopulated according to the 80,000-person population requirement, "any new plan required moving significant numbers of new voters into these districts in order to comply with the principle of one person, one vote." *Id.*

Under Section 5 of the VRA, 52 U.S.C. § 10304, then-applicable to Virginia's redistricting efforts, any new plan was barred from "diminish[ing] the number of districts [compared to the prior plan] in which minority groups can 'elect their preferred candidates of choice' (often called 'ability-to-elect' districts)." *Bethune-Hill*, 137 S. Ct. at 795 (quoting *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016)). Section 5 thus mandated that covered states "maintain a minority's ability to elect a preferred candidate of choice." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1272 (2015).

To comply with this "non-retrogression" requirement, the legislature determined that all 12 majority-minority districts were required to have a minimum 55% BVAP in the 2011 plan. *Bethune-Hill*, 137 S. Ct. at 795. Imposition of this racial threshold necessitated an increase in the BVAP in three districts, which had BVAP levels below 55% at the time of the 2010 census. Pl. Ex. 50 at 72. The selection of the 55% BVAP figure was based on Jones' assessment of the needs of District 75, a rural majority-minority district located along the state's southern border. *Id.* at 796; DI Ex. 94 at 7. The legislature also applied the 55% BVAP requirement to the remaining 11 majority-minority districts. *Id.*

In April 2011, the legislature passed House Bill 5005 with broad bipartisan support, as well as support from a majority of the black members of the House of Delegates (the black caucus). *Id.* After Governor Robert McDonnell signed the bill into law, the United States Department of Justice "precleared" the plan in accordance with Section 5 of the VRA.[7] *Id.*; Pl. Ex. 48 at 10-12; *see infra* note 12 (discussion of Section 5 preclearance).

In 2014, the plaintiffs, registered voters in the 12 majority-minority districts, filed the present civil action against the Virginia State Board of Elections and some of its officials (the state defendants).[8] *See* Dkt. No. 1; Am. Compl. ¶¶ 7-22. The plaintiffs challenged their districts of residence[9] as racial gerrymanders in violation of the Equal Protection Clause. *Id.*; Am. Compl. ¶¶ 1-2. They sought declaratory and injunctive relief prohibiting the state from holding further elections based on the unconstitutional districts. Am.

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[7] The first version of the 2011 plan, House Bill 5001, was vetoed by Governor McDonnell. Pl. Ex. 48 at 10. House Bill 5005, the version that ultimately passed, was substantially similar to House Bill 5001 with respect to the House of Delegates districts, with certain minor changes made at the request of current delegates and localities. Pl. Ex. 48 at 10; 1st Trial Tr. at 378, 383, 411, 418.

[8] This Court has on two occasions permitted the plaintiffs to substitute new named plaintiffs in this case, based on a prior plaintiff's change of residence or death. Dkt. No. 66-68, 71, 180, 181. The operative amended complaint was filed on June 15, 2015. Dkt. No. 71, 181.

[9] We refer to the 88 non-majority-minority districts that the plaintiffs do not challenge as the "non-challenged districts."

Compl. at 17. The initial three-judge district court, as well as the present three-judge panel, were constituted pursuant to 28 U.S.C. § 2284(a).[10] Dkt. No. 11; *see also* Am. Compl. ¶ 24.

Shortly after the complaint was filed, the Virginia House of Delegates and its speaker, Delegate William J. Howell (the intervenors), who were the "parties that drew and enacted the redistricting plan at issue," filed a motion to intervene. Dkt. No. 13 at 2. We granted the motion. Dkt. No. 26. Since that time, the intervenors have borne the primary responsibility of defending the 2011 plan, with the state defendants joining the intervenors' defense but declining to present an independent substantive defense. 1st Trial Tr. at 12-13, 830; 2nd Trial Tr. at 23-24. For ease of reference, we will refer to the state defendants and the intervenors collectively as "the intervenors."

Following a bench trial in July 2015 (the first trial), a majority of this Court found that race was not the predominant factor used in the construction of 11 of the 12 challenged districts. *Bethune-Hill*, 141 F. Supp. 3d at 505, 510-11. In reaching this conclusion, the majority found that the plaintiffs had not shown that the legislature's use of race was in "actual conflict" with traditional, race-neutral districting criteria. *Id.* at 524, 553-55, 559-71 (citation omitted). With respect to

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[10] The initial panel included United States District Judges Robert E. Payne and Gerald Bruce Lee, and United States Circuit Judge Barbara Milano Keenan. Dkt. No. 11. Following remand from the Supreme Court, the Chief Judge of the Fourth Circuit Court of Appeals replaced Judge Lee with United States District Judge Arenda Wright Allen as a member of the three-judge panel. Dkt. No. 133.

District 75, however, the Court found that race had predominated, but that the legislature's use of race was narrowly tailored to achieve the compelling state interest of compliance with the VRA. *Id.* at 511. Judge Keenan filed a separate dissenting opinion, concluding that by applying a mechanical 55% BVAP quota across the board to all 12 challenged districts, race predominated over other districting criteria as a matter of law. *Id.* at 572 (Keenan, J., dissenting).

The Supreme Court affirmed this Court's holding that District 75 satisfied strict scrutiny, concluding that Jones had engaged in an adequate "functional analysis" of the BVAP level necessary to avoid retrogression in that district. *Bethune-Hill*, 137 S. Ct. at 801. However, the Court disagreed with the majority's predominance analysis in the other 11 districts. The Court held that the plaintiffs were not required to show "actual conflict" between race and traditional districting criteria to prove predominance. *Id.* at 797-98. The Court further explained that "there may be cases where challengers will be able to establish racial predominance in the absence of an actual conflict by presenting direct evidence of the legislative purpose and intent or other compelling circumstantial evidence," considering the district as a whole. *Id.* at 799-800. Accordingly, the Supreme Court remanded the case to this Court for reconsideration of the question of predominance under the proper standard. *Id.* at 800.

On remand, we instructed the parties to file briefs regarding the impact of the Supreme Court's decision on this case, the continued viability of our prior factual findings, and the need for additional evidence to be

presented. Dkt. No. 136. After considering the parties' positions, we held a four-day bench trial in October 2017 (the second trial), in which the plaintiffs and the intervenors presented substantial new evidence. Dkt. No. 224. Most relevant here, the plaintiffs offered the testimony of two new expert witnesses, and the intervenors presented a redistricting consultant who testified that he had played a significant role in drawing the 2011 plan. *See infra* discussions of testimony of Jonathan Rodden, Maxwell Palmer, and John Morgan. The parties also submitted extensive briefing following the second trial. Dkt. No. 230-33.

We now proceed to discuss the relevant legal principles, to consider the evidence presented at both trials, to make relevant credibility determinations, and to apply the Supreme Court's instructions to these factual findings.

II.

Under the Equal Protection Clause, a legislature may not "separate its citizens into different voting districts on the basis of race," without satisfying the rigorous requirements of strict scrutiny. *Miller v. Johnson*, 515 U.S. 900, 911, 916, 920 (1995). The harm from such racial sorting is apparent. By assigning voters to districts based on race, a state "engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* at 911-12 (internal quotation marks omitted) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)); *see also Bethune-Hill*, 137 S. Ct. at 797 (explaining that harm from racial sorting "include[s] being personally subjected to a racial

classification as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group" (citation omitted)).

Nevertheless, legislatures often act with a "consciousness of race" in their redistricting decisions, and can do so without subjecting their actions to strict scrutiny. *Bush v. Vera*, 517 U.S. 952, 958 (1996) (principal opinion of O'Connor, J.). In assessing a claim of racial gerrymandering, courts "must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Abbott v. Perez*, No. 17-586, slip op. at 21 (U.S. June 25, 2018) (quoting *Miller*, 515 U.S. at 915-16). Accordingly, a plaintiff alleging a racial gerrymandering claim bears the burden "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Bethune-Hill*, 137 S. Ct. at 797 (quoting *Miller*, 515 U.S. at 916).

Race is the "predominant factor" in a redistricting decision when the legislature "subordinate[s] traditional race-neutral districting principles to racial considerations." *Alabama*, 135 S. Ct. at 1270 (emphasis and alterations omitted). Although the application of a mandatory BVAP requirement for a district does not alone compel the conclusion that race predominated, *see generally Bethune-Hill*, 137 S. Ct. 788, such a requirement is evidence of the manner in which the legislature used race in drawing the district's boundaries, *see id.* at 800; *Alabama*, 135 S. Ct. at 1267.

For example, if a legislature made line-drawing decisions for the predominant purpose of complying with such a BVAP requirement, and the evidence shows that these race-based decisions dwarfed any independent consideration of traditional districting criteria, a court could conclude that the legislature "relied on race in substantial disregard of customary and traditional districting practices." *Miller*, 515 U.S. at 928 (O'Connor, J., concurring). Under such circumstances, a court could conclude that race was the predominant factor in the construction of the district, because "[r]ace was the criterion that, in the State's view, could not be compromised," and the state applied traditional districting criteria "only after the race-based decision had been made." *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (*Shaw II*); *see also Alabama*, 135 S. Ct. at 1267 (explaining that when state "expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria," this use of a racial target "provides evidence that race motivated the drawing of particular lines").

As set forth by the Supreme Court, traditional districting criteria include "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation." *Alabama*, 135 S. Ct. at 1270 (citations and internal quotation marks omitted). Notably, however, the objective of achieving population equality is not a traditional districting factor, as the requirement of equal population is a "background rule against which redistricting takes place." *Id.* at 1270-71. Instead, "the 'predominance' question concerns *which* voters the legislature decides to choose, and specifically whether the legislature

predominately uses race as opposed to other, 'traditional' factors when" moving voters for the purpose of equalizing population in a given district. *Id.* at 1271.

Contiguity, a description of geographical connectedness within a district, and compactness, a measure of the regularity of the shape of a district, are traditional districting criteria that also are required by the Virginia Constitution. Va. Const. art. 2, § 6; *see Shaw II*, 517 U.S. at 905-06 (explaining that shape of a district that is "highly irregular and geographically non-compact by any objective standard" is evidence of racial predominance); *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029, at *10-11, 15 (E.D. Va. June 5, 2015); *Wilkins v. West*, 571 S.E.2d 100, 109-10 (Va. 2002). Voters residing in a geographically compact district, or in a common political subdivision, are more likely than voters who are more geographically dispersed to share similar interests that can be represented by a common legislator. Similarly, a district that is drawn with some consideration of "communities of interest" links voters who share a "common thread of relevant interests," including political, social, or economic interests. *Miller*, 515 U.S. at 919-20; *see also Bush*, 517 U.S. at 964 (principal opinion of O'Connor, J.) (communities of interest may share media outlets, public transportation, and educational and religious institutions).

Because the Equal Protection Clause "prohibits unjustified racial classifications" and not "misshapen districts," the Supreme Court has held that "a conflict or inconsistency" between a districting plan and

traditional districting criteria is not required to establish predominance. *Bethune-Hill*, 137 S. Ct. at 798-99. Thus, although such a conflict or inconsistency may constitute "persuasive circumstantial evidence" of racial predominance, traditional districting criteria still may be subordinated to race without such "actual conflict." *Id.* at 799. Under a contrary rule, "a State could construct a plethora of potential maps that look consistent with traditional, race-neutral principles," while still using "race for its own sake [as] the overriding reason" for choosing the boundaries of the districts. *Id.*

For similar reasons, if a legislature uses race as a proxy for a legitimate districting criterion, such as partisan advantage or protection of incumbents,[11] this consideration of race likewise is subject to strict scrutiny. *Bush*, 517 U.S. at 968-73 (principal opinion of O'Connor, J.). Using race in the service of a legitimate goal does not alter the underlying fact that the legislature has selected voters for inclusion in a district based on race. *See id.* at 972 ("[T]he fact that racial data were used in complex ways, and for multiple objectives, does not mean that race did not predominate over other considerations."). Accordingly, when a state asserts that it drew district lines on the basis of partisanship rather than race, we must conduct "a sensitive inquiry into all circumstantial and direct evidence of intent" to determine whether the plaintiffs have "disentangle[d] race from politics and prove[n] that the former drove a district's lines."

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[11] The Supreme Court has recognized that a goal of avoiding pairing incumbents in a single district is a legitimate districting criterion. *Bush*, 517 U.S. at 964 (principal opinion of O'Connor, J.).

Cooper v. Harris, 137 S. Ct. 1455, 1473 & n.7 (2017) (citation and internal quotation marks omitted).

Our predominance inquiry requires a "holistic analysis" that involves consideration of the "districtwide context" to determine "the legislature's predominant motive for the design of the district *as a whole*." *Bethune-Hill*, 137 S. Ct. at 800 (emphasis added). In conducting this inquiry, we must determine "the actual considerations that provided the essential basis for the lines drawn," and will disregard "post hoc justifications the legislature in theory could have used but in reality did not." *Id.* at 799 (emphasis omitted). Our consideration of the legislature's true motivations in drawing the districts is highly fact-specific, and involves numerous credibility findings based on our assessment of the testimony presented at trial. *See Cooper*, 137 S. Ct. at 1473-78.

If a plaintiff makes a sufficient showing of racial predominance, the burden shifts to the state to satisfy the requirements of strict scrutiny, namely, that the use of race was narrowly tailored to achieve a compelling state interest. *Bethune-Hill*, 137 S. Ct. at 800-01 (citing *Miller*, 515 U.S. at 920). In the present case, the intervenors have asserted that compliance with Section 5 of the VRA, 52 U.S.C. § 10304, is a compelling state interest justifying the predominant use of race in the 2011 plan. *See* DI Post-Trial Br. at 29-32. Section 5 "prohibits a covered jurisdiction[12] from

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[12] The term "covered jurisdiction" within the meaning of the VRA refers to states and political subdivisions that formerly maintained a test or a device as a prerequisite to voting, and had low voter registration or turnout. *See Shelby Cty., Ala. v. Holder*, 133 S. Ct.

adopting any change that 'has the purpose of or will have the effect of diminishing the ability of [the minority group] to elect their preferred candidates of choice.'" *Alabama*, 135 S. Ct. at 1272 (quoting 52 U.S.C. § 10304(b)). Like the Supreme Court, upon a finding of racial predominance, we will assume without deciding that compliance with Section 5 is a compelling state interest, and will focus our analysis on the question whether the legislature's reliance on race was narrowly tailored to achieving that interest. *See, e.g.*, *Bethune-Hill*, 137 S. Ct. at 801; *Alabama*, 135 S. Ct. at 1272-74.

To satisfy the narrow tailoring prong of strict scrutiny, a state must show that it had a "strong basis in evidence" supporting its race-based decision. *Alabama*, 135 S. Ct. at 1274 (citation omitted). Under this standard, a state need not make a precisely accurate determination of the BVAP percentage required to satisfy the mandate of Section 5 in a particular district. *Id.* at 1273. Instead, the state must show that it had "good reasons to believe" that its use of race was required under Section 5, even if a court later determines that the state's action was not in fact necessary to comply with the statute. *Id.* at 1274 (emphasis and citation omitted).

Notably, Section 5 "does not require a covered jurisdiction to maintain a particular numerical

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2612, 2619-20 (2013). Section 5 prohibited such covered jurisdictions from implementing a change in voting procedures without approval, or "preclearance," from the Department of Justice or a three-judge federal court. *Id.* at 2620-21. In 2013, the Supreme Court invalidated the formula articulated in Section 4 of the VRA for determining whether a jurisdiction was "covered" for purposes of Section 5. *See id.* at 2631.

minority percentage" in a district. *Id.* at 1272. Instead, Section 5 imposes a "non-retrogression" standard, which requires the state "to maintain a minority's ability to elect a preferred candidate of choice." *Id.* at 1272-73. To achieve this goal, a state should not rely on a "mechanically numerical view as to what counts as forbidden retrogression," but should adopt a "purpose-oriented view" that asks simply whether a redistricting plan maintains a minority group's ability to elect its preferred candidate. *Id.* at 1273-74.

With these principles in mind, we turn to consider whether the evidence presented at the two trials in this case supports a finding that race was the predominant factor in the construction of the 11 remaining challenged districts. Upon a finding that race predominated, we will consider whether the state had a "strong basis in evidence" for its race-based decisions. *Id.* at 1274.

III.

In accordance with the Supreme Court's instruction that we employ a "holistic analysis" in determining the legislature's predominant motive, *Bethune-Hill*, 137 S. Ct. at 800, we begin by reviewing the evidence of racial motive in the plan as a whole, *see Alabama*, 135 S. Ct. at 1267-68. Although statewide evidence is not dispositive with respect to predominance in any given district, "[s]uch evidence is perfectly relevant" to our evaluation whether the plaintiffs have satisfied their burden of showing "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within

or without a particular district." *Id.* at 1267 (quoting *Miller*, 515 U.S. at 916).

A.

Two factual matters presented in the prior proceedings are relevant to our predominance analysis. First, the intervenors conceded in the first trial that the legislature was required to consider, and did consider, race in its redistricting decisions in order to comply with the VRA. 1st Trial Tr. at 403, 405. Consistent with this admission, the House Committee on Privileges and Elections adopted a resolution (the House resolution) listing several written criteria to guide the redistricting process. *See* Pl. Ex. 16.

The primary criterion of "population equality" mandated that each district "be as nearly equal to the population of every other district as is practicable," with population deviations in the House districts within plus-or-minus one percent. Pl. Ex. 16 ¶ I. After population equality, the House resolution listed the "Voting Rights Act" as the second criterion, and provided as follows:

> Districts shall be drawn in accordance with the laws of the United States and the Commonwealth of Virginia including compliance with protections against the unwarranted retrogression or dilution of racial or ethnic minority voting strength. Nothing in these guidelines shall be construed to require or permit any districting policy or action that is contrary to the United States Constitution or the Voting Rights Act of 1965.

Pl. Ex. 16 ¶ II. The House resolution also enumerated other, less important criteria, including contiguity and compactness, single-member districts, and communities of interest. Pl. Ex. 16 ¶¶ III-VI; *see also* 1st Trial Tr. at 402-03. The House resolution further emphasized that population equality and compliance with federal and state law, and the VRA in particular, "shall be given priority in the event of conflict among the criteria." Pl. Ex. 16 ¶ VI.

A second factual matter also is now settled, namely, that the legislature employed a 55% BVAP threshold in drawing each of the challenged districts. The fact that there was a 55% BVAP requirement is contrary to the position that the intervenors maintained at the first trial. 1st Trial Tr. at 20, 280-81, 406, 409, 860. In this Court's first opinion, we described the parties' dispute regarding the fixed or aspirational nature of the 55% number, but ultimately found that "the 55% BVAP figure was used in structuring the districts," *Bethune-Hill*, 141 F. Supp. 3d at 519, a conclusion that was affirmed by the Supreme Court, *see Bethune-Hill*, 137 S. Ct. at 794 ("[T]he boundary lines for the 12 districts at issue were drawn with a goal of ensuring that each district would have a [BVAP] of at least 55%."); *see also* Dissent Op. at 118 ("It is undisputed that race was considered, and it is established that a 55% BVAP rule was employed."). Upon our review of the record of both trials, showing that the legislature achieved a 55% minimum BVAP in each district by drawing boundaries based on that threshold, we now find as a matter of fact

that the legislature employed a mandatory 55% BVAP floor in constructing all 12 challenged districts.[13]

Although the existence of the 55% threshold is not dispositive of the question of predominance, *see generally Bethune-Hill*, 137 S. Ct. 788, the fixed BVAP requirement nevertheless is evidence of the legislature's motive, *see id.* at 800; *Alabama*, 135 S. Ct. at 1267 ("That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State."). Moreover, race may predominate in the drawing of a particular legislative district even if that district begins with a BVAP over 55%, or if particular district lines were not necessary to achieve the 55% figure. *See, e.g.*, Dissent Op. at 123-24, 130-31. We therefore evaluate the evidentiary weight to accord the use of the 55% threshold in the context of the other evidence presented.

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[13] The dissent relies heavily on certain other factual findings made in this Court's prior opinion, including the relative credibility of both lay and expert witnesses, and the legislature's motivations for drawing certain lines. *See, e.g.*, Dissent Op. at 109-12 & n.10, 128-29, 139-40, 147-48. Given that these prior findings were reached while applying an erroneous legal standard, and in light of the voluminous new evidence presented by both parties on remand, we conclude that these prior factual findings are open to reconsideration. Moreover, because this Court unanimously agreed to allow the presentation of new evidence, the Court also reopened the question of the credibility of the witnesses who testified at the second trial.

B.

We turn to consider the evidence of predominance that the plaintiffs presented at the second trial. The plaintiffs offered the testimony of two experts: Dr. Jonathan Rodden, a professor of political science at Stanford University, and Dr. Maxwell Palmer, an assistant professor of political science at Boston University.[14] Pl. Ex. 69 at 72; Pl. Ex. 71 at 69. We conclude that both experts provided credible testimony based on sound methodology, and we will discuss their testimony in turn.

At trial, Dr. Rodden was accepted as an expert in the field of "geo-spatial data analysis"[15] and its application to redistricting. 2nd Trial Tr. at 159. Dr. Rodden used geo-spatial data to determine whether it was "plausible that the final shape of the districts could have emerged without race being used as the dominant consideration." Pl. Ex. 69 at 2. In particular, Dr. Rodden used census data to determine the geographic distribution of groups of voting-age white residents and

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[14] At the first trial, the plaintiffs also presented the testimony of Dr. Stephen Ansolabehere, a professor of government at Harvard University. Pl. Ex. 50 at 88; 1st Trial Tr. at 124. The court accepted Dr. Ansolabehere as an expert in the field of redistricting. 1st Trial Tr. at 124. Although we rely primarily on the testimony of Drs. Palmer and Rodden, unless otherwise noted, we also consider certain opinions and findings of Dr. Ansolabehere, because we conclude that his testimony on these cited matters was credible and was based on the application of sound principles.

[15] Dr. Rodden explained that "geo-spatial data" refers to data that can be represented geographically on a map, thereby allowing "the visualization of quantitative information" to help explain a social phenomenon. 2nd Trial Tr. at 145-48.

voting-age black residents. Pl. Ex. 69 at 8; 2nd Trial Tr. at 163-64. He placed white "dots" representing a designated number of white voting-age residents, and black "dots" representing the same number of black voting-age residents, randomly within each census block. Pl. Ex. 69 at 8; *see, e.g.*, Pl. Ex. 69 at 10. The resulting "dot density maps" are a visual illustration of the density of white and black voting-age populations in the geographic region depicted on the map.[16] Pl. Ex. 69 at 8; *see also, e.g.*, Pl. Ex. 69 at 10. Dr. Rodden examined each challenged district individually, as well as in regional groupings, noting that changes made to one district also impacted neighboring districts. 2nd Trial Tr. at 162.

Dr. Rodden concluded that the dot density maps reflected "telltale signs" of "race-based maneuvering." Pl. Ex. 69 at 4. In examining these maps, Dr. Rodden opined that the goals of population equality and a 55% BVAP could not be achieved in the challenged districts without "considerable creativity," and "in many cases . . . do[ing] considerable violence to traditional districting principles." Pl. Ex. 69 at 3. Dr. Rodden thus determined that race was the predominant factor used in constructing all 11 challenged districts. 2nd Trial Tr. at 161.

Dr. Rodden explained that, in general, expanding the underpopulated challenged urban districts into the

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[16] Although the intervenors' expert, Dr. Thomas Hofeller, challenged the usefulness of dot density maps, Dr. Hofeller conceded that Dr. Rodden used the proper methodology in constructing the dot density maps presented in this case. 2nd Trial Tr. at 912, 940-41.

overpopulated white suburbs would have caused the BVAP in the challenged districts to fall below the 55% threshold. Pl. Ex. 69 at 3; *see, e.g.*, 2nd Trial Tr. at 174. Given this significant underpopulation in many of the challenged districts, and the geographic distribution of white and black residents, the legislature was forced to consider the racial make-up of individual VTDs and, at times, to split VTDs according to the racial composition of particular census blocks.[17] Pl. Ex. 69 at 3-4. Dr. Rodden further noted that boundary lines between districts frequently were small residential roads separating predominantly white and predominantly black neighborhoods. Pl. Ex. 69 at 4. Accordingly, Dr. Rodden concluded that it was "simply not possible to devise a credible post-hoc explanation for these decisions that is not based on race." Pl. Ex. 69 at 4.

The visual depictions of racial sorting in the dot density maps are telling. The regional maps showed that most significant concentrations of black voters were swept into one of the challenged districts. *See, e.g.*, Pl. Ex. 69 at 12, 42. These maps also indicated that heavily populated black areas often were shared between multiple challenged districts, sometimes splitting municipal boundaries in the process. *See* Pl. Ex. 69 at 43. As Dr. Rodden observed, "[w]hen respect for county or municipal boundaries would have

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[17] Overall population figures, as well as racial and ethnic data, are available in Virginia at the census block level. 2nd Trial Tr. at 372. However, election result data is not reported by census block, and it therefore is impossible to know in Virginia how voters in an individual census block voted. 2nd Trial Tr. at 372; *see supra* note 4; *see also infra* p. 25 (discussing use of census block and VTD data in Maptitude).

undermined the ability to reach the racial target, they were ignored." Pl. Ex. 69 at 4.

The dot density maps of individual districts, and "zoomed in" portions of those districts, illustrated the precision with which district boundaries coincided directly with racial residential patterns. *See, e.g.*, Pl. Ex. 69 at 45, 47. The dot density map of District 80, for instance, showed a narrow "bridge" consisting of two largely white VTDs, which were used to connect geographically distinct clusters of black voters. *See* Pl. Ex. 69 at 53. And as discussed further below, the maps plainly showed that VTDs in each region were split exactly along racial lines. *See, e.g.*, Pl. Ex. 69 at 38 (District 63, Hopewell Ward 7), 47 (District 95, Reservoir, Epes, Denbigh, Jenkins), 58 (District 89, Granby); 2nd Trial Tr. at 275. In one such example, the legislature excised from District 89 a single census block of predominantly white voters from the Granby VTD, and allocated those voters to a neighboring non-challenged district. Pl. Ex. 69 at 57-58. These visual depictions led Dr. Rodden to reach the unavoidable conclusion that the challenged districts were designed to capture black voters with precision. *See* 2nd Trial Tr. at 275.

Dr. Palmer was accepted as an expert in the area of redistricting and data analysis as it pertains to redistricting. 2nd Trial Tr. at 366. Dr. Palmer conducted statistical analyses regarding the populations of the challenged districts to determine whether race predominated in the construction of those districts. *See* Pl. Ex. 71 at 2. Because respect for political boundaries is an important traditional redistricting principle, Dr. Palmer focused on the

manner in which VTDs and political subdivisions were split in the plan. Pl. Ex. 71 at 4 ¶ 13; 2nd Trial Tr. at 370. And as discussed further below, Dr. Palmer also evaluated the reports of other experts who previously testified in the case. 2nd Trial Tr. at 366-67.

Dr. Palmer reached several general conclusions relevant to our racial predominance inquiry. First, he observed that the number of split VTDs increased between the 2001 plan and 2011 plan, and that splitting VTDs in the 2011 plan was more common in the challenged districts[18] than in the non-challenged districts. Pl. Ex. 71 at 5; *see also* Pl. Ex. 50 at 70; 2nd Trial Tr. at 371.

Second, Dr. Palmer concluded that there is "substantial evidence" that race was the predominant factor in the manner that VTDs, cities, and other places were split between challenged and non-challenged districts. Pl. Ex. 71 at 2 ¶ 3; 2nd Trial Tr. at 369. With only a few exceptions, "these areas were divided such that the portions allocated to challenged districts had a higher BVAP percentage than the portions allocated to non-challenged districts." Pl. Ex. 71 at 2 ¶ 3; *see also* 2nd Trial Tr. at 381. In particular, in 31 of the 32 VTDs that were split between challenged and non-challenged districts, the areas assigned to the challenged districts had higher BVAPs than the areas assigned to the non-challenged districts. Pl. Ex. 71 at 4 ¶ 14; 2nd Trial Tr. at 374. And, on average, the BVAP of the portions of split VTDs

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[18] In conducting his analysis, Dr. Palmer considered all 12 challenged districts, including District 75. *See* Pl. Ex. 71 at 2 ¶ 2; 2nd Trial Tr. at 373.

assigned to challenged districts was 24% higher than the portions assigned to non-challenged districts. Pl. Ex. 71 at 4 ¶ 14; 2nd Trial Tr. at 374. This pattern of higher BVAP areas being assigned to challenged districts held true for the ten cities, four towns, one military base, and ten unincorporated places[19] split between challenged and non-challenged districts.[20] Pl. Ex. 71 at 4 ¶ 16, 14 ¶¶ 71-73, Tables 8-15; 2nd Trial Tr. at 392.

Dr. Palmer found that BVAP level was predictive of an area's inclusion in a challenged district, because "[a]s the BVAP of a census block increases, the probability that it is assigned to a challenged district increases." Pl. Ex. 71 at 6-7 ¶ 26; *see also* 2nd Trial Tr. at 385-86. Dr. Palmer stated that this relationship between BVAP and assignment to a challenged district is statistically significant. Pl. Ex. 71 at 6-7 ¶ 29; 2nd Trial Tr. at 386. Based on this data, Dr. Palmer concluded that VTDs split between challenged and non-challenged districts "were divided by race." Pl. Ex. 71 at 7 ¶ 29. Dr. Palmer similarly concluded that "race predominated over the principle of keeping political subdivisions whole," because "[c]ities, towns, unincorporated places, and even a military base were all divided according to race." Pl. Ex. 71 at 16 ¶ 82.

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[19] An "unincorporated place" is "[a] census designated place with an official federally recognized name." Pl. Ex. 71 at 13 ¶ 69.

[20] Dr. Palmer noted a single minor exception to this pattern regarding seven people from a particular census place assigned to District 70. Pl. Ex. 71 at 14 n.14.

Splits of particular VTDs provide stark illustrations of these racial divisions. For example, Dr. Rodden explained that District 95, located on the peninsula, was drawn to separate black and white voters with "remarkable precision." Pl. Ex. 69 at 46; *see also* Pl. Ex. 71 at 35. The map-drawers achieved this division by splitting four VTDs located at the northern end of the district, Jenkins, Denbigh, Epes, and Reservoir, "precisely at the point where black neighborhoods transitioned to white neighborhoods." Pl. Ex. 69 at 47. Epes was split between District 95 and a neighboring non-challenged district along small residential streets, separating multi-family housing with significant black populations on one side of the street from homes occupied by white residents on the other side of the street. Pl. Ex. 69 at 47-48.

Dr. Palmer emphasized that racial disparities in the manner that VTDs were split were "especially strong evidence of racial predominance."[21] Pl. Ex. 71 at 2 ¶ 4; *see also* 2nd Trial Tr. at 379. Dr. Palmer and Dr. Rodden both explained that election data are not available for individual census blocks that make up the VTDs, and Virginia does not maintain political party registration data in voter files. Pl. Ex. 71 at 2 ¶ 4; 2nd Trial Tr. at 372, 390, 954-58. For these reasons, the

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[21] We disagree with the intervenors' contention that split VTDs affect too few people to be relevant to our predominance inquiry. 2nd Trial Tr. at 990-91. A decision to split a VTD, by definition, occurs when a map-drawer draws the outer boundary of a district, that is, when the map-drawer chooses "which voters" to include to achieve population equality. *Alabama*, 135 S. Ct. at 1271 (emphasis omitted). In our view, starkly racial splits of VTDs are persuasive evidence of the predominant use of race.

Maptitude software is not capable of showing election result data at the census block level. 2nd Trial Tr. at 954-58. Accordingly, the precision and specificity with which VTD splits separated white and black voters cannot be explained by anything other than the intentional consideration of race. *See* Pl. Ex. 69 at 4 (Rodden: "[I]t is simply not possible to devise a credible post-hoc explanation for these decisions that is not based on race."); *Bush*, 517 U.S. at 970-71 (principal opinion of O'Connor, J.) (explaining that, because mapping software applied only racial data at the block level, VTD and street-level splits supported the conclusion that race predominated).

Third, the results of Dr. Palmer's statistical analysis showed that black voters were moved from non-challenged districts into challenged districts at a higher rate than white or Democratic voters. Pl. Ex. 71 at 2 ¶ 5; 2nd Trial Tr. at 395. Conversely, white and Democratic voters were moved out of the challenged districts and into non-challenged districts at a higher rate than black voters. Pl. Ex. 71 at 2 ¶ 5; 2nd Trial Tr. at 395. In all nine challenged districts in which population was shifted to non-challenged districts, the transferred areas had a lower BVAP than the BVAP of the district as a whole. Pl. Ex. 71 at 17 ¶ 85, 61. And, with one exception,[22] all the non-challenged districts that experienced transfers of population into challenged districts moved out areas with a higher

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[22] The single exception was population movement out of District 100, a non-challenged district. District 100 "was uniquely constrained," due to the geography of the district on the Eastern Shore, making it extremely difficult to effect a movement of population in and out of that district. Pl. Ex. 71 at 19 ¶ 102.

BVAP than the non-challenged district as a whole. Pl. Ex. 71 at 16-17 ¶ 84. From these data, Dr. Palmer concluded that "race was the predominant factor in moving populations between districts." Pl. Ex. 71 at 28 ¶ 146.

Using an individual district as an example provides further illustration of these complex racial patterns in population shifts. Under the 2001 plan, District 74 in the Richmond area already had a population within the allowable one percent population deviation, and, at 62.7% BVAP, was well over the 55% BVAP threshold. *See* Pl. Ex. 50 at 69, 72. Nevertheless, the legislature removed about 16,000 voters out of District 74, and moved about 16,000 different voters in, with the BVAP of the group moved out 17.8% higher than the group moved in. Pl. Ex. 50 at 73, 77. The BVAP of the areas removed from District 74 differed based on whether the receiving district was a challenged district subject to the 55% BVAP requirement. For example, District 74 lost about 2,000 people, with a very low 3.8% BVAP, to non-challenged District 72. Pl. Ex. 71 at 43. In contrast, District 74 lost a group of nearly 8,000 people who were moved into challenged District 71, which needed a significant influx of black voters to reach the 55% threshold. Pl. Ex. 71 at 43. That group of 8,000 people moved from District 74 into District 71 had an 85.5% BVAP. Pl. Ex. 71 at 43. Accordingly, District 74, with its surplus of BVAP, served as a "donor" district to surrounding challenged districts with lower BVAP levels. Pl. Ex. 69 at 15, 31.

And finally, Dr. Palmer engaged in an extensive analysis of the question whether racial composition or political party performance in a VTD was a stronger

predictor that a particular VTD would be assigned to a challenged district. 2nd Trial Tr. at 398. As part of his analysis, Dr. Palmer sought to examine the methodologies and conclusions of two experts who testified on the same subject in the first trial, namely, Dr. Jonathan Katz, a professor of social sciences and statistics at the California Institute of Technology, who was presented as a witness by the intervenors, and Dr. Stephen Ansolabehere, who was called by the plaintiffs. Pl. Ex. 50 at 1-2; DI Ex. 16 at 1, 3; *see supra* note 14 (discussing Dr. Ansolabehere's qualifications). Dr. Katz also testified at the second trial.

Dr. Ansolabehere concluded that race had a larger effect on the assignment of VTDs to challenged districts than did Democratic vote share. Pl. Ex. 50 at 46-47 ¶ 130; Pl. Ex. 71 at 21 ¶ 115. In contrast, Dr. Katz concluded that the effect of both race and party on the assignment of VTDs was nearly equal, and that any effect was not statistically significant.[23] DI Ex. 16 at 20; *see also* Pl. Ex. 71 at 21-22 ¶ 115.

Dr. Palmer identified two differences between the models used by Dr. Katz and Dr. Ansolabehere. 2nd Trial Tr. at 396. Dr. Palmer concluded that these

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[23] In their original reports, Drs. Katz and Ansolabehere used slightly different election data to determine average Democratic party vote share in each VTD. Pl. Ex. 71 at 21 ¶ 111. For the sake of easier comparison between the experts' results, Dr. Palmer used in his analysis the data preferred by Dr. Katz. Pl. Ex. 71 at 22 ¶ 116. When Dr. Palmer replicated Dr. Ansolabehere's original analysis using Dr. Katz's data, the result was substantially the same as that reached by Dr. Ansolabehere, namely, that race rather than party was the primary predictor in the assignment of VTDs. Pl. Ex. 71 at 22 ¶ 117; 2nd Trial Tr. at 398-99.

differences had an important effect on the results. First, Dr. Katz failed to weight each VTD by total population in considering the effect of race and party on likely VTD assignment. Pl. Ex. 71 at 22 ¶ 119; 2nd Trial Tr. at 401. As Dr. Palmer explained, a VTD containing 5,000 people is more significant to the results of the model than a VTD containing only 50 people and, thus, population weights were an important aspect of an accurate analysis. Pl. Ex. 71 at 22 ¶ 119; *see also* 2nd Trial Tr. at 396-97. After adding the appropriate population weights to Dr. Katz's model, Dr. Palmer explained that the results of the analysis almost mirrored the results reached by Dr. Ansolabehere, namely, that "race, not party, is the predominant factor in the assignment of VTDs to challenged districts." Pl. Ex. 71 at 22-23 ¶ 120; 2nd Trial Tr. at 400.

Second, in the first trial, Dr. Katz criticized Dr. Ansolabehere's analysis for failing to account for the distance between the center of VTDs and challenged districts. *See* DI Ex. 16 at 20; 1st Trial Tr. at 501, 503-05. In Dr. Katz's view, because VTDs that are located farther away from a challenged district were less likely to be included in that district, proper modeling should include a measure of distance. DI Ex. 16 at 20; *see also* Pl. Ex. 71 at 21 ¶ 114. Dr. Palmer also accounted for distance in his model, but explained that the particular measure of distance that Dr. Katz used was flawed because it considered the distance from each VTD to *all 12* challenged districts. Pl. Ex. 71 at 23 ¶¶ 121-22; 2nd Trial Tr. at 403. As a result, Dr. Katz's analysis produced the illogical conclusion that, for several of the challenged districts, VTDs farther away from those districts were more likely to be assigned to a

challenged district than VTDs located closer to such districts. Pl. Ex. 71 at 23 ¶ 121; 2nd Trial Tr. at 404, 406. Accordingly, Dr. Palmer incorporated into his model a different measure of distance, namely, the distance from each VTD to the nearest challenged district. Pl. Ex. 71 at 23 ¶ 122; 2nd Trial Tr. at 407. This approach produced results showing that the farther away a VTD was from the closest challenged district, the less likely it was that this VTD would be assigned to a challenged district. Pl. Ex. 71 at 23 ¶ 123; 2nd Trial Tr. at 408.

Dr. Palmer ultimately concluded that Dr. Katz's results differed from Dr. Ansolabehere's "due to errors in Dr. Katz's model." Pl. Ex. 71 at 24 ¶ 124. In light of these conclusions, including the illogical results from Dr. Katz's distance measurement, we accept as more credible Dr. Palmer's approach and the results he reached regarding race-versus-party.[24]

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[24] We pause to emphasize an additional, significant factor undercutting Dr. Katz's credibility. In his supplemental report prepared for the second trial, Dr. Katz asserted that because "in Virginia, race data is very highly correlated with party identification," Dr. Palmer was "absolutely incorrect" in the "foundational assumption that Census blocks do not contain political information." DI Ex. 101 at 11-12. Dr. Katz reiterated this position in his testimony. 2nd Trial Tr. at 834.

As previously discussed, using race as a proxy for political party affiliation constitutes the use of *race*, not party, in a predominance analysis. Legislators may not assume that an individual voter will vote a particular way based exclusively on her race without justifying that highly suspect race-based assumption. For this additional reason, we decline to credit Dr. Katz's testimony.

Like Dr. Ansolabehere, Dr. Palmer concluded that "the effect of race is much larger than that of party in the assignment of VTDs to challenged districts," and that, therefore, race predominated over party in the assignment of VTDs to those challenged districts. Pl. Ex. 50 at 45 ¶¶ 127-29; Pl. Ex. 71 at 24 ¶¶ 123, 125; *see also* 2nd Trial Tr. at 369, 408. Moreover, "[w]hile the effect of race is large and statistically significant, there is no substantive effect of Democratic vote share on the assignment of a VTD to a challenged district." Pl. Ex. 71 at 24 ¶ 123; *see also* Pl. Ex. 71 at 63; 2nd Trial Tr. at 408. Based on Dr. Palmer's analyses, we conclude that the BVAP of a VTD was a more accurate predictor of whether that VTD would be included in a challenged district than the Democratic performance of the VTD.

C.

In contrast to the geo-spatial and statistical evidence presented by Dr. Rodden and Dr. Palmer, the intervenors again called Jones as a witness, and also offered testimony by demographer John Morgan. 2nd Trial Tr. at 466-67, 586-87. Morgan, who had nationwide redistricting experience in two prior redistricting cycles, was hired by the Republican House majority to assist Jones with the 2011 redistricting process. 2nd Trial Tr. at 588, 593-94. Morgan testified during the second trial that he played a substantial role in constructing the 2011 plan, which role included his use of the Maptitude software to draw district lines. 2nd Trial Tr. at 593. Morgan testified in considerable detail about his reasons for drawing dozens of lines covering all 11 challenged districts, including purportedly race-neutral explanations for several boundaries that appeared facially suspicious. Despite

Morgan's alleged centrality to the 2011 redistricting process, the intervenors neglected to call Morgan to testify at the first trial. The intervenors' belated reliance on Morgan's testimony strongly suggests an attempt at post hoc rationalization. For this and the following reasons, we decline to credit Morgan's testimony.

Morgan claimed that he, rather than Jones, decided to split VTDs at the end of the map-drawing process primarily to equalize population between adjoining districts. 2nd Trial Tr. at 613, 623, 730; *see also* 2nd Trial Tr. at 473-74, 504-07. Morgan testified that he "really didn't take race into account in splitting the VTDs" in the challenged districts. 2nd Trial Tr. at 714-15.

We find that this explanation was not credible. As an initial matter, Dr. Palmer emphasized that to equalize population, typically only one VTD needed to be split between a pair of districts. 2nd Trial Tr. at 381. Yet several of the challenged districts had multiple VTDs that were split with the same non-challenged district. Pl. Ex. 71 at 52 (three VTD splits between Districts 63 and 62, and two splits between Districts 63 and 64), 53 (three VTD splits between Districts 74 and 72), 54 (two VTD splits between Districts 89 and 79; 77 and 76; and 90 and 85), 55 (five VTD splits between Districts 95 and 94).

And notably, as discussed above, VTDs were split with exacting precision separating predominantly black and white residential areas, sometimes dividing a VTD along the middle of a street. *See* Pl. Ex. 69 at 38-39 & Figure 12, 47-48; 2nd Trial Tr. at 494. In our view, Morgan's contention, that the precision with which

these splits divided white and black areas was mere happenstance, simply is not credible. 2nd Trial Tr. at 679, 748-50; *see also* 2nd Trial Tr. at 379 (Palmer: "If we're splitting VTDs to equalize population, we shouldn't expect to see the same consistent pattern of division by race across all of them.").

Similarly, Morgan asserted that he split certain VTDs at the census block level in District 95 to increase Republican voting strength in a neighboring, non-challenged district. DI Ex. 94 at 14; 2nd Trial Tr. at 675-80. This contention conflicted with the testimony of Dr. Rodden and Dr. Palmer, as well as with the testimony of the intervenors' own expert, Dr. Thomas Hofeller,[25] who uniformly stated that election results and partisan affiliation data were not available at the census block level. Pl. Ex. 71 at 2 ¶ 4; 2nd Trial Tr. at 372, 390, 942-44, 954-58. Indeed, Morgan conceded that he could only estimate political performance at the census block level by applying election results from the VTD as a whole equally to each census block. 2nd Trial Tr. at 622. This "partisan" approach based on overall VTD performance, however, would not result in VTDs being split precisely to separate predominantly black and white

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[25] Dr. Hofeller generally opined on the extent to which the challenged districts achieved certain goals, such as maintaining compactness, contiguity, and core retention. *See* DI Ex. 14. He also criticized Dr. Rodden's report for, among other things, failing to propose alternate boundaries for the 2011 map. *See* DI Ex. 102 at 5-7 ¶¶ 14-21. Although the evidence presented by Dr. Hofeller is relevant to the question whether the plan generally complied with traditional districting criteria, Dr. Hofeller's opinions do not alter our evaluation based on the totality of the evidence of the legislature's motivations for drawing specific district lines.

neighborhoods. Accordingly, the only conclusion to draw from Morgan's testimony is that, insofar as he sought to obtain partisan political advantage by splitting VTDs in particular ways, he did so by relying on race as a proxy for political preference.[26] This assumption that members of a particular racial group vote a certain way is antithetical to the principles underlying the Equal Protection Clause. Using race as a proxy for political performance constitutes the use of *race*, not the use of *politics*, for purposes of our predominance analysis. *Bush*, 517 U.S. at 968 (principal opinion of O'Connor, J.) ("[T]o the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation."). For these reasons, we conclude that Morgan did not present credible testimony, and we decline to consider it in our predominance analysis.

And finally, we observe that at the second trial, Jones had a murky recollection regarding several important topics on which he previously had testified, despite having had access to the record of his testimony in the first trial for review. *See, e.g.*, 2nd Trial Tr. at 493-94. Additionally, the testimony of multiple, credible witnesses at the second trial directly undermined much of Jones' prior key testimony. For example, Jones testified repeatedly at the first trial that he consulted most members of the House when drawing the 2011 plan, and relied heavily on input from incumbent members of the black caucus who

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[26] Given the starkly racial nature of the VTD splits, however, we do not discount the possibility that Morgan decided which census blocks to include in challenged districts directly based on the racial composition of those blocks.

represented the challenged districts. 1st Trial Tr. at 291-93, 324, 330, 381.

Jones stated at the first trial that he received "extensive input" on the plan from Delegate Algie Howell, who represented District 90. 1st Trial Tr. at 338-39, 343; Parties' Stipulations ¶ 17, Dkt. No. 208. At the second trial, however, Howell denied that he gave significant input into the drawing of his or any district. According to Howell, he had a single, brief conversation with Jones after the plan was drawn. 2nd Trial Tr. at 82-83. Similarly, although Jones purported to rely on "significant input" from incumbent Delegate Matthew James in the construction of District 80, 1st Trial Tr. at 347-49, James testified that he offered no input whatsoever to Jones regarding the configuration of District 80.[27] 2nd Trial Tr. at 71-73. In the face of these denials, Jones' testimony at the second trial was far more equivocal than the first. When asked specifically

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[27] To the extent that Jones claimed that he relied on the consent of the black caucus based on comments Jones received from Delegate Lionell Spruill Sr., who represented District 77, we do not credit this explanation. *See, e.g.*, 2nd Trial Tr. at 499; Parties' Stipulations ¶ 17, Dkt. No. 208. First, and most notably, the intervenors did not call Spruill as a witness at either trial to corroborate this theory. Second, members of the black caucus did not share uniform opinions about the plan, nor did the members all express their views to Spruill. Pl. Ex. 48 at 11; DI Ex. 9; 1st Trial Tr. at 387, 800; 2nd Trial Tr. at 107. And finally, there is evidence in the record that certain delegates who spoke to Spruill about the redistricting process generally did not offer substantive opinions about the construction of their own districts. For example, James testified that he had a single telephone conversation with Spruill regarding the redistricting process generally, but that James offered no opinion on the configuration of his district to Spruill during that call. 2nd Trial Tr. at 73-74.

about James' role in drawing District 80, Jones responded that he could not "answer [the question] directly," but that it was his "understanding" that James had given input.[28] 2nd Trial Tr. at 499.

We recognize that Jones offered voluminous testimony at the first trial explaining many of his line-drawing decisions. We also do not doubt that Jones considered some traditional districting factors in constructing the 2011 plan. And we do not disagree with the dissent's view that because memories may fade with time, we cannot expect witnesses' recollections to remain perfectly clear six years after the events in question. *See* Dissent Op. at 95. However, we do not discredit Jones' testimony based solely on his faded memory. The first trial occurred more than four years after the redistricting occurred, yet Jones had a remarkably clear recollection of countless, specific line-drawing decisions. But when faced at the second trial with new witnesses challenging material aspects of his previous testimony, and having had access to the transcript of his testimony at the first trial, Jones was

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[28] Our colleague in dissent criticizes our reliance on the testimony of certain members of the black caucus, including Howell and James, who did not testify at the first trial. The dissent declines to "accept on principle [their] long-delayed views of what happened in 2011," particularly given the delegates' decision to vote in favor of the plan. Dissent Op. at 95-97, 102-03. We disagree with this view. These delegate witnesses were not needed until the second trial, when the plaintiffs had the opportunity to undermine the version of events that Jones had offered at the first trial. Moreover, these witnesses did not offer legal opinions regarding the constitutionality of the plan, but instead testified about their personal knowledge of their own districts and interactions with the map-drawers.

unable to produce convincing explanations for the discrepancies. Thus, in light of Jones' very poor memory at the second trial, as well as his inability to account for material inconsistencies in his testimony, we give little weight to Jones' testimony regarding the reasons underlying the many changes made to district boundary lines.

After considering this statewide evidence, we find that the overall racial disparities in population movement, and the splits of VTDs and geographies along racial lines, are strong evidence of racial predominance in the challenged districts. These disparities and shifts did not result from the application of traditional redistricting principles, but rather from the predominant use of race. Additionally, Dr. Palmer's conclusion that race predominated over party in predicting the likelihood that a VTD would be assigned to a challenged district further supports a finding of racial predominance. As instructed by the Supreme Court, our task now is to examine holistically the legislature's use of race in drawing each individual challenged district.

IV.

Mindful of the statewide evidence of race-based decisionmaking identified by Drs. Rodden and Palmer, we turn to examine the legislature's use of race in the construction of each of the 11 challenged districts. Because a change to the boundaries of any one district caused a ripple effect on nearby districts, we will consider the challenged districts in three regional groupings: the Richmond/Tri-City area, North Hampton Roads (the peninsula), and South Hampton Roads/Norfolk.

A.

We begin with the Richmond/Tri-City region, which includes the greater Richmond metropolitan area, as well as the cities of Petersburg, Colonial Heights, and Hopewell. Pl. Ex. 69 at 9. Five challenged districts were located in the Richmond/Tri-City region in both the 2001 plan and the 2011 plan, namely, Districts 63, 69, 70, 71, and 74. Pl. Ex. 69 at 9. Since the 2001 redistricting cycle, the black population in Richmond had increasingly spread from the city limits into the surrounding suburbs. Pl. Ex. 69 at 13. The largely urban districts under the 2001 plan, Districts 69 and 71, had lost population, while both challenged and non-challenged suburban districts either were at the target population level, or were overpopulated. Pl. Ex. 50 at 72; Pl. Ex. 69 at 13. Accordingly, to achieve a 55% BVAP in all five challenged districts, the legislature made numerous decisions motivated by race, including using Districts 70 and 74, which had a surplus of BVAP and adequate population, as "donors" of BVAP to other challenged districts. *See infra* pp. 43-45, 51-54 (discussions of Districts 70 and 74); *see also* Pl. Ex. 50 at 72.

At the end of the 2011 redistricting process, every majority-black VTD in the Richmond/Tri-City region was either wholly or partially within a challenged district. Pl. Ex. 69 at 41. And in the final 2011 plan, the Richmond City portions of Districts 69, 70, 71 and 74 had a combined BVAP of 56.2%, whereas the Richmond City areas in non-challenged District 68 had a 6.8% BVAP. Pl. Ex. 71 at 15 ¶ 78, 58.

For the reasons discussed below, we conclude that race was the predominant factor in the legislature's construction of Districts 63, 69, 70, 71, and 74.

i.

We begin with District 71. Overwhelming evidence shows the many ways in which the legislature used race as the predominant, overriding criterion in constructing the district.

Under both the 2001 plan and the 2011 plan, District 71 contained portions of the city of Richmond and Henrico County. Pl. Ex. 50 at 69, 71. The incumbent delegate, Jennifer McClellan, had represented District 71 since 2005 and had won each election thereafter by overwhelming majorities. 1st Trial Tr. at 23-27. After hearing McClellan testify consistently at both trials, we find that her testimony was highly credible and was corroborated by other evidence in the case.

Two features of District 71 at the time of the 2010 census motivated the 2011 boundary changes, and had ripple effects throughout the Richmond/Tri-City region. First, District 71 was underpopulated by about 5,800 people. Pl. Ex. 50 at 72; Pl. Ex. 69 at 15. Even more importantly, however, District 71 was racially heterogeneous and had the lowest BVAP of any of the challenged districts at 46.3%, down from about 55% in 2001. Pl. Ex. 50 at 72; 1st Trial Tr. at 25. Because of this low starting BVAP, Jones conceded that the 55% BVAP threshold impacted the way the district was drawn. 2nd Trial Tr. at 532-33.

To increase the district's BVAP by nearly nine percentage points, more than 11,000 people with a

21.3% BVAP were moved *out* of District 71, and more than 17,000 people with a noticeably higher 72.1% BVAP were moved *into* District 71. Pl. Ex. 50 at 72-73, 77. Accordingly, the difference in BVAP between the groups moved in and out of District 71 was more than 50 percentage points. Pl. Ex. 50 at 77. Notably, areas moved out of District 71 into *non-challenged* districts had an extremely low 6.6% BVAP. Pl. Ex. 50 at 79.

In addition to these racial discrepancies in population movement, three line-drawing decisions clearly illustrate the importance of race in the construction of District 71. First, the district added several heavily populated, high BVAP Richmond VTDs to its eastern edge, which VTDs previously were located in Districts 70 and 74: VTD 604 (91% BVAP), VTD 701 (97% BVAP), VTD 702 (94% BVAP), and a portion of VTD 703 (90% BVAP). Pl. Ex. 64 at 9-10; Pl. Ex. 69 at 24, 29; DI Ex. 94 at 3-5. VTDs 701, 702, and part of 703 were removed from neighboring District 70 over the objection of the District 70 incumbent, Delegate Delores McQuinn, who resided nearby and had long represented these areas as a delegate and, earlier, as a member of the school board.[29] DI Ex. 94 at 3-4; 2nd Trial Tr. at 56, 97-98, 103-04, 533. Nevertheless, McQuinn understood that she "would have to lose some of the African-American population in that area" so that District 71 would receive sufficient black voters to achieve the 55% BVAP threshold. 2nd Trial Tr. at 103-04. Jones himself conceded that this eastward move into District 70 was required to ensure

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[29] We credit McQuinn's testimony regarding her preferences for her own district, in light of her long-standing association with the neighborhoods at issue.

that District 71 had sufficient BVAP to meet the 55% number and, thus, that the 55% BVAP threshold impacted the drawing of the district's lines. 2nd Trial Tr. at 532-33; *see also* DI Ex. 94 at 4.

Second, despite Jones' contention that he sought to make District 71 more "Richmond centric" by removing three predominantly white Henrico County VTDs at the northwest edge of the district,[30] he proceeded to add the Ratcliffe VTD from Henrico County to the eastern end of District 71. 1st Trial Tr. at 305; 2nd Trial Tr. at 177-78, 531. Ratcliffe, unlike the three predominantly white Henrico County VTDs removed from District 71, had an 83% BVAP. Pl. Ex. 69 at 21, 24; *see also* 2nd Trial Tr. at 48-49.

And finally, VTD 207, part of the Fan neighborhood of Richmond, was removed from District 71 and transferred into District 68, represented by then-incumbent Republican Delegate Manoli Loupassi. Pl. Ex. 69 at 17-19; 2nd Trial Tr. at 36, 175-76. As a result, the Fan neighborhood, which previously was contained primarily within District 71, was split between District 71 and more-suburban District 68. 2nd Trial Tr. at 28, 34-36, 165. Prior to the 2011 redistricting, the entirety of VTD 207 had been located in District 71 for at least 20 years. 2nd Trial Tr. at 35-36.

McClellan testified that she strongly opposed removing VTD 207 and sought to minimize splitting the Fan, the neighborhood where her own residence was located. 2nd Trial Tr. at 28, 36, 38. VTD 207 was

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[30] Hilliard (6% BVAP); Stratford Hall (19% BVAP); and Summit Court (8% BVAP). Pl. Ex. 69 at 21.

heavily Democratic, had high levels of voter turnout, and had been a strong base of support for McClellan, but had a very low 3% BVAP.[31] Pl. Ex. 69 at 17; 1st Trial Tr. at 39; 2nd Trial Tr. at 35, 52. According to McClellan, when she approached Jones with her concern, Jones stated that he would be open to suggested revisions, provided that any changes complied with the population equality and 55% BVAP requirements. 2nd Trial Tr. at 30-32. McClellan later used the Maptitude software to draft alternative versions of the plan that would retain VTD 207 in District 71. 2nd Trial Tr. at 36, 39-41. However, because including all or a portion of VTD 207 in District 71 would reduce the district's BVAP below 55%, McClellan "became resigned" to the fact that she

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[31] At the first trial, Jones testified that he moved VTD 207 into District 68 based on Loupassi's preference, though Jones could not "recall directly" at the second trial any specific conversation with Loupassi. 1st Trial Tr. at 305; 2nd Trial Tr. at 485. Notably, the intervenors did not call Loupassi as a witness to corroborate their theory regarding VTD 207.

In light of this lack of clarity, we do not credit the contention that Loupassi requested that VTD 207 be moved into District 68. Although he may have had certain business interests in the area, Loupassi never represented the neighborhood as a delegate or as a former member of the city council, and the VTD typically voted 75% to 80% Democratic, including in favor of McClellan. Pl. Ex. 69 at 19; 1st Trial Tr. at 39; 2nd Trial Tr. at 488-89.

would lose VTD 207 from her district.[32] 2nd Trial Tr. at 36, 39.

For similar reasons, predominantly white VTD 505 was split between District 71 and District 69, another challenged district located to the south. *See* Pl. Ex. 71 at 12 ¶ 62; DI Ex. 94 at 4. McClellan testified that, although she and Betsy Carr, the incumbent delegate in District 69, sought to keep VTD 505 wholly within District 69, doing so would have reduced the BVAP of that district below 55%. 2nd Trial Tr. at 41-42, 59; *see also* Pl. Ex. 71 at 12 ¶ 62. Retaining all of VTD 505 in District 71 similarly would have reduced the BVAP of that district below 55%. Pl. Ex. 71 at 12 ¶ 62; 2nd Trial Tr. at 388-89. Accordingly, the two incumbent delegates agreed to split VTD 505 and to allocate the largely white precinct between the two challenged districts. 2nd Trial Tr. at 41-42, 59, 182; *see also* Pl. Ex. 71 at 12 ¶ 62.

After considering the credibility of the witnesses and the documentary evidence, we conclude that race predominated in the construction of District 71. Jones conceded that the low existing BVAP in the district

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[32] The data support this anecdotal evidence that race motivated the removal of VTD 207 from District 71. Dr. Palmer's report showed that District 71 and District 68 swapped populations of about 3,000 people. Pl. Ex. 71 at 43. However, the BVAP of the areas moved into District 71 from 68 was about ten percentage points higher than the areas moved from District 71 into 68. Pl. Ex. 71 at 17 ¶ 91, 43. Without this swap, the BVAP of District 71 would have dipped below 55%. Pl. Ex. 71 at 18-19 ¶ 91. Clearly, swapping nearly identically sized groups was not needed to promote population equality, supporting the inference that these moves were racially motivated.

required significant boundary changes to raise the BVAP above 55%. His admission that the 55% BVAP threshold affected the boundaries of District 71 is compelling direct evidence of racial predominance. *See* 2nd Trial Tr. at 532-33. Additionally, the 50 percentage point differential in BVAP between the populations moved in and out of the district shows a "stark split[] in the racial composition of populations moved into and out of" District 71. *Bethune-Hill*, 137 S. Ct. at 800; *see also Alabama*, 135 S. Ct. at 1271; Pl. Ex. 50 at 77. This discrepancy further was illustrated by the swaps of majority-white for majority-black VTDs that were made contrary to the wishes of the incumbents. And finally, the testimony of McClellan and McQuinn indicates that the legislature disregarded traditional districting principles, including incumbency protection and maintaining communities of interest, in order to achieve a 55% BVAP in District 71.

ii.

We turn to consider District 70. *See* DI Ex. 94 at 3. As previously discussed, the significant race-based maneuvers required to increase the BVAP of District 71 had a substantial impact on the boundaries of District 70. For this and other reasons, we conclude that race predominated in the construction of District 70.

In both the 2001 map and the 2011 map, District 70 included portions of the city of Richmond, Chesterfield County, and Henrico County. Pl. Ex. 50 at 69, 71. The incumbent, McQuinn, lived in Richmond and had served on the Richmond City School Board and the Richmond City Council for many years before being elected to the House of Delegates in 2009. 2nd Trial Tr.

at 97-99. After observing McQuinn testify at the second trial, we find that her testimony was credible.

Unlike District 71, District 70 was not underpopulated, as it was within the one percent population requirement. Pl. Ex. 50 at 72. District 70 also satisfied the 55% BVAP threshold with a 61.8% BVAP. Pl. Ex. 50 at 72. However, because of its surplus BVAP, District 70 was treated as a BVAP "donor" for other challenged districts, resulting in the transfer of high BVAP areas from District 70 to neighboring Districts 71 and 69, which needed both population and BVAP. Pl. Ex. 69 at 29; *see also* Pl. Ex. 50 at 36 ("[I]n order to accommodate the increase in BVAP in HD 71, HD[] 70 . . . gave up areas with high concentrations of adult African Americans."). In particular, as discussed above, District 70 "donated" to District 71 high BVAP VTDs 701, 702, and part of 703. *See supra* pp. 39-40. And to the northwest, District 70 "donated" VTD 811 (76% BVAP) and VTD 903 (64% BVAP) to District 69. Pl. Ex. 69 at 29; DI Ex. 94 at 2-3.

Reflecting its "donor" status and ideal population numbers, nearly 26,000 people were moved out of District 70, and a different 26,000 were moved in. Pl. Ex. 50 at 73. The BVAP of areas moved out of District 70 was more than 16 percentage points higher than the BVAP of the areas moved in. Pl. Ex. 50 at 77. As a result of these population shifts, the BVAP of District 70 dropped by over five percentage points, to 56.4% in the 2011 plan. Pl. Ex. 50 at 72.

In our view, the primary factor driving these population shifts is plain. No changes to the boundaries of District 70 were needed to ensure adequate population in that district, yet 26,000 people were

shifted in a noticeable racial pattern. Pl. Ex. 50 at 72-73. It is clear that the 55% BVAP threshold for the challenged districts affected the boundaries of District 70, as Jones, McClellan, and McQuinn all testified that VTDs 701, 702, and part of 703 were removed from District 70 to ensure that the BVAP of District 71 reached 55%. 2nd Trial Tr. at 44, 103-04, 532-33, 538-39. We find that these population and VTD transfers were not made to achieve traditional districting goals, but instead were done to ensure a numerical minimum BVAP level in neighboring districts. For these reasons, we conclude that race was the predominant factor used in the construction of District 70.

iii.

We next consider District 69, which included portions of the city of Richmond and crossed the James River into Chesterfield County, in both the 2001 plan and the 2011 plan.[33] Pl. Ex. 50 at 69; Pl. Ex. 69 at 26; DI Ex. 94 at 2. We conclude that race predominated in the construction of District 69, which was affected by the race-based maneuvers in the other Richmond-area challenged districts.

District 69 was significantly underpopulated in 2011, and required an addition of about 8,700 people to satisfy the population equality requirement. Pl. Ex. 50 at 72; Pl. Ex. 69 at 26. District 69 had a 56.3% BVAP under the 2001 plan, and thus could not lose much BVAP to stay above 55% BVAP in the 2011 plan. Pl. Ex. 50 at 72. Jones offered little explanation for the

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[33] The incumbent in District 69 was Betsy Carr, who did not testify at either trial. Parties' Stipulations ¶ 17, Dkt. No. 208.

line-drawing decisions in District 69, other than the fact that the district was underpopulated and that the incumbents in adjacent districts lived near one another. 1st Trial Tr. at 304, 309-11; 2nd Trial Tr. at 540-43.

The characteristics of the areas moved into District 69 illustrate the importance of race. For example, non-challenged District 27, which bordered District 69 on the west, was overpopulated by 8,000 people, close to the population deficit existing in District 69. Pl. Ex. 69 at 14, 26. Instead of collecting largely white Chesterfield County precincts from District 27, however, District 69 *lost* two predominantly white Chesterfield precincts to District 27. Pl. Ex. 69 at 26; Pl. Ex. 71 at 43; 2nd Trial Tr. at 183-84. And despite the fact that District 70 was at equal population under the 2001 plan and already was serving as a "donor" to District 71, District 69 received multiple precincts from District 70. Pl. Ex. 69 at 26; 2nd Trial Tr. at 181-84; *see supra* p. 44 (District 70 as "donor" to 71). In particular, District 69 received several predominantly white precincts from District 70, which would have decreased the BVAP of District 69 below 55%. 2nd Trial Tr. at 181-83. Accordingly, District 69 also received two high-BVAP VTDs, 811 and 903, from District 70. Pl. Ex. 69 at 26; 2nd Trial Tr. at 181-83.

In both the VTDs split between District 69 and a non-challenged district, the portion of the split VTD allocated to District 69 had a higher BVAP than the portion of the split VTD allocated to the non-challenged district. Pl. Ex. 71 at 9 ¶ 37. For example, District 69 received 77% of the population from split VTD 410, but 93% of the VTD's BVAP. Pl. Ex. 71 at 9 ¶ 37, 32; *see*

also 2nd Trial Tr. at 184-85. And, as discussed above, VTD 505 was split between District 69 and District 71 to ensure that neither district would obtain too many white voters from that VTD and drop the BVAP of those districts below 55%. Pl. Ex. 71 at 12 ¶ 62; 2nd Trial Tr. at 41-42, 59.

Ultimately, the BVAP of the populations moved in and out of District 69 to achieve population equality was nearly identical. Pl. Ex. 50 at 72, 77. In the 2011 plan, District 69 had a BVAP of 55.2%, just barely satisfying the 55% BVAP threshold. Pl. Ex. 50 at 72.

Based on this evidence, we reach the inescapable conclusion that race played a significant role in the district lines in the Richmond region as a whole, and that the legislature subordinated traditional districting criteria to race. With respect to District 69, the legislature faced limited options to remedy the significant population deficit in the district while also achieving compliance with the 55% BVAP threshold. Other than District 71 to the northeast and District 70 to the southeast, District 69 was bordered by majority-white districts. *See* Pl. Ex. 69 at 14. District 71 did not have population or BVAP to spare.[34] Accordingly, like District 71, District 69 received the advantage of the ability of District 70 to "donate" BVAP, which enabled District 69 to retain a 55% BVAP. Considering the relationship among, and the racial "needs" of, Districts 69, 70, and 71, we conclude that race played a predominant role in the construction of District 69.

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[34] The relatively small number of people moved from District 71 to District 69 had a mere 5.1% BVAP. Pl. Ex. 71 at 43.

iv.

We turn to consider District 63. The incumbent delegate in District 63, Rosalyn Dance, testified at both trials. *See* 1st Trial Tr. at 65; 2nd Trial Tr. at 111-12. Dance served as a member of the six-person House of Delegates Committee on Privileges and Elections during the 2011 redistricting cycle. 2nd Trial Tr. at 112. After considering Dance's testimony from the first and second trials, we find that her testimony was credible. We also conclude that overwhelming evidence demonstrated that race predominated in the drawing of District 63.

In the 2001 map, District 63 included portions of Chesterfield County, and all of Dinwiddie County and the city of Petersburg. Pl. Ex. 50 at 69. In the 2011 plan, District 63 still included part of Chesterfield County, added part of Prince George County and part of the city of Hopewell, and split Dinwiddie County with District 75. Pl. Ex. 50 at 69; Pl. Ex. 71 at 57. In addition to these new split geographies, eight VTDs were split in the 2011 plan, compared with zero split VTDs in the 2001 plan. Pl. Ex. 50 at 70. District 63 also experienced a drastic reduction in compactness between the 2001 plan and the 2011 plan. Pl. Ex. 50 at 70.

These departures from traditional districting principles were driven largely by the population and BVAP "needs" of neighboring District 75, which was located in the Southside area of Virginia. DI Ex. 94 at 6. As discussed above, this Court concluded after the first trial that race predominated in the drawing of District 75 but that the use of race there satisfied strict

scrutiny, which decision the Supreme Court affirmed. *See Bethune-Hill*, 137 S. Ct. at 800-02.

The legislature faced several challenges in redrawing District 75, which was underpopulated by more than 9,000 people and began with a BVAP of only 55.3%. Pl. Ex. 50 at 72. Because "[v]irtually all" the rural majority-black VTDs in the area already were included in District 75, "drastic maneuvering" was required to ensure that the BVAP of District 75 remained above 55%. *Bethune-Hill*, 141 F. Supp. 3d at 555; *see also Bethune-Hill*, 137 S. Ct. at 796-97; Pl. Ex. 69 at 35. These maneuvers included the "avowedly racial" decision to split Dinwiddie County between District 75 and District 63. *Bethune-Hill*, 141 F. Supp. 3d at 553; Pl. Ex. 50 at 69; 1st Trial Tr. at 80-81.

Before these changes benefitting District 75 were made, District 63 also was significantly underpopulated and, as a result of the split of Dinwiddie County, lost considerable additional population and BVAP. Pl. Ex. 50 at 72; Pl. Ex. 69 at 35. Dance testified that, to compensate for this loss of BVAP, District 63 received the heavily black areas of the city of Hopewell and Prince George County, for the express purpose of increasing the district's BVAP to comply with the 55% BVAP requirement.[35] 2nd Trial

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[35] Dance testified that she asked to retain in her district the New Hope VTD, where a long-time supporter lived. 2nd Trial Tr. at 115, 121-22, 126-27. Dance also testified that, contrary to Jones' claim at the first trial that she requested an oddly shaped "hook" around New Hope to draw out a primary challenger, she had no such challenger in 2011 and had made no such request. 1st Trial Tr. at 326; 2nd Trial Tr. at 118. Although Dance faced a primary opponent in 2013, that candidate did not live in the affected "hook"

Tr. at 116-17. The data corroborate Dance's explanation, showing, for example, that the division of Hopewell plainly tracked racial residential patterns, with the white portion of Hopewell assigned to non-challenged District 62. Pl. Ex. 71 at 15 ¶ 75, 37. Notably, the BVAP of the portion of Hopewell assigned to District 63 was *three times higher* than the portion of Hopewell assigned to District 62. Pl. Ex. 71 at 15 ¶ 75, 57.

The split of a particular VTD in Hopewell further illustrates the precision with which the map-drawers sought to separate black and white voters. Hopewell Ward 7 was split between Districts 63 and 62 along racial lines, following the boundaries of black and white neighborhoods. *See* Pl. Ex. 71 at 31. As a result, although District 63 received 29% of the total population of the Ward 7 VTD, District 63 received 51% of the BVAP of that VTD. *See* Pl. Ex. 69 at 38; Pl. Ex. 71 at 8 ¶ 32. This same pattern, in which District 63 received higher BVAP sections of split VTDs, was true for all four VTDs split between District 63 and a non-challenged district. Pl. Ex. 71 at 8 ¶ 32.

It is clear that the role of race in the construction of District 63 was inextricably intertwined with the race-based population shifts of District 75. After District 63 lost significant BVAP from Dinwiddie County to District 75, the map-drawers disregarded traditional districting principles to ensure that District 63 continued to comply with the 55% BVAP threshold. *See*

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area. 2nd Trial Tr. at 118. Jones equivocated on this issue in his testimony at the second trial. 2nd Trial Tr. at 493. We credit Dance's explanation over the account given by Jones.

2nd Trial Tr. at 117. The map-drawers split geographies and VTDs precisely according to race. *See Bush*, 517 U.S. at 970-71 (principal opinion of O'Connor, J.) ("Given that the districting software used by the State provided only racial data at the block-by-block level, the fact that [the district] . . . splits voter tabulation districts and even individual streets in many places . . . suggests that racial criteria predominated . . . ." (internal citations omitted)). We therefore find that the configuration of District 63 cannot be explained by traditional, race-neutral districting principles. In light of this evidence, we conclude that race was the predominant factor in the construction of District 63.

v.

Finally, we consider the role of race in the configuration of District 74. District 74 experienced the ripple effect of the race-based decisions in the Richmond City districts as well as in District 63, to the southwest. *See* Pl. Ex. 69 at 14. Like the other Richmond/Tri-City districts, we conclude that race predominated in the construction of District 74.[36]

Under the 2001 plan, District 74 included Charles City County, and portions of Henrico County, the city of Hopewell, Prince George County, and the city of Richmond. Pl. Ex. 50 at 69. District 74 lost its portions of Prince George County and the city of Hopewell under the 2011 plan. Pl. Ex. 50 at 69. The 2001 version of the district was shaped like an axe with a long handle and

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[36] The incumbent in District 74, Joseph Morrissey, did not testify at either trial. Parties' Stipulations ¶ 17, Dkt. No. 208.

was the least compact of all the challenged districts. Pl. Ex. 50 at 70; DI Ex. 94 at 5. The district maintained the same bizarre shape and low compactness score under both the 2001 and 2011 plans.[37] Pl. Ex. 50 at 70; DI Ex. 94 at 5.

District 74 was slightly overpopulated under the 2001 plan, but was still within the one percent population deviation allowance. Pl. Ex. 50 at 72. District 74 also had a very high BVAP of 62.7%. Pl. Ex. 50 at 72. Accordingly, like District 70, District 74 served as a "donor" district to surrounding challenged districts that needed an influx of BVAP to reach the 55% BVAP threshold. Pl. Ex. 69 at 15, 31-32. In furtherance of this goal, as discussed above, 16,414 people were moved out of District 74, and 15,855 were moved into that district. Pl. Ex. 50 at 73. Notably, the BVAP of the areas removed from District 74 and transferred to other challenged districts was 69%, whereas the BVAP of areas moved from District 74 to non-challenged districts was only 20.5%. Pl. Ex. 50 at 79. *See supra* p. 27 (noting that BVAP of areas sent from District 74 to challenged District 71 was 85.5%, but BVAP of areas sent from District 74 to non-challenged District 72 was 3.8% (citing Pl. Ex. 71 at 43)).

We pause to highlight some of the familiar areas that other challenged districts in the Richmond/Tri-City region received from District 74. For example, the

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[37] Although District 74 retained the same compactness score after the 2011 redistricting, District 95 experienced a severe reduction in compactness, causing it to become the least compact of the challenged districts in the 2011 map. Pl. Ex. 50 at 70.

high BVAP Ratcliffe VTD in Henrico County was "donated" to District 71 as part of that District's eastward shift to gain additional BVAP.[38] *See* Pl. Ex. 69 at 31-32; DI Ex. 94 at 4. District 74 also "donated" the high BVAP areas of Hopewell to District 63 to replace some of the BVAP that District 63 had lost to District 75 in Dinwiddie County.[39] Pl. Ex. 69 at 31-32; 1st Trial Tr. at 80-83.

Moreover, in all three VTDs split between District 74 and a non-challenged district, the portion of the VTD allocated to District 74 had a higher BVAP

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[38] The intervenors assert that District 74 was not truly a "donor" district, because District 71 also had transferred a high BVAP population into District 74. DI Post-Trial Br. at 20. We observe, however, that District 74 "donated" about 5,500 *more* people to District 71 than District 74 received from 71. Pl. Ex. 71 at 43. Accordingly, although the BVAP percentage of the populations moved in and out of District 74 was about equal, more black voters were moved from District 74 into 71 than from District 71 into 74. Pl. Ex. 71 at 43. We also note that the term "donor" district does not suggest that those particular districts exclusively removed population, as even those districts had to retain population equality and 55% BVAP. Instead, the term "donor" is intended to describe the general phenomenon occurring between challenged districts with relatively high and low starting BVAP levels.

[39] Jones claimed that the city of Hopewell was moved into District 63 in order to remove a water crossing of the James River in District 74, and that the change was completely unrelated to race. *See* DI Ex. 94 at 6; 1st Trial Tr. at 316-17; 2nd Trial Tr. at 480-81. As discussed above, however, we conclude that high BVAP areas of Hopewell were given to District 63 for the purpose of increasing that district's BVAP. Nevertheless, even if we were to credit Jones' explanation, the attainment of a traditional districting principle, such as reducing water crossings, can co-exist with the predominant use of race. *See Bethune-Hill*, 137 S. Ct. at 798-99.

than the portion allocated to a non-challenged district. Pl. Ex. 71 at 9 ¶ 41, 53. For example, District 74 retained 38% of the population of the Moody VTD, but received 85% of the VTD's BVAP. Pl. Ex. 71 at 9 ¶ 41, 32. In other words, the portion of the Moody VTD in District 74 had a 41.7% BVAP, whereas the BVAP of the portion of the Moody VTD in District 72 was only 4.3%. Pl. Ex. 71 at 53.

As with the other Richmond/Tri-City region districts, we conclude that race predominated in the construction of District 74. The irregular shape of the district is circumstantial evidence that the legislature subordinated traditional districting criteria to race. *See Miller*, 515 U.S. at 913 (explaining that the bizarre shape of a district "may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines"). Additionally, we find that the line-drawing decisions in District 74 were made in response to the pressures of population and BVAP deficits in Richmond District 71, as well as the extreme population and BVAP "needs" of District 63, and were not made to pursue traditional districting goals. Accordingly, District 74 acted as a "donor" to other challenged districts, transferring population and geographic areas on a plainly racial basis and subordinating traditional districting criteria in the process.

B.

We turn to consider the North Hampton Roads region, otherwise known as "the peninsula," located in the Tidewater area of Virginia. Pl. Ex. 69 at 41; *see, e.g.*, Pl. Ex. 71 at 11. Challenged Districts 92 and 95

were located on the peninsula and included portions of the cities of Hampton and Newport News. Pl. Ex. 50 at 15 ¶ 37, 69; Pl. Ex. 69 at 41. Between 2001 and the 2010 census, the peninsula lost substantial population, resulting in severe underpopulation in Districts 92 and 95. Pl. Ex. 50 at 72; Pl. Ex. 69 at 46; DI Ex. 62. In addition to being bordered by bodies of water, Districts 92 and 95 were adjacent to large concentrations of white residents in other districts. Pl. Ex. 69 at 42-44; DI Ex. 94 at 13-14. Thus constrained by both geography and demographics, the legislature was required to add substantial population to Districts 92 and 95, while retaining a 55% BVAP in each. *See* Pl. Ex. 69 at 46.

Accordingly, the legislature undertook several patently race-based maneuvers to equalize population in these districts. Most notably, the legislature added a long, narrow appendage to District 95, which on its face disregarded traditional districting criteria. *See* Pl. Ex. 69 at 46-47. The appendage also split several VTDs, causing separation of predominantly black neighborhoods from predominantly white neighborhoods with striking precision. *See* Pl. Ex. 69 at 47. Dr. Rodden could not "fathom" an explanation for these changes other than race. Pl. Ex. 69 at 48.

In addition to these plainly racial splits of VTDs, the data also show more general illustrations of race-based line-drawing on the peninsula. In the 2011 plan, all the majority-black VTDs in the vicinity of Districts 92 and 95 were included in one of those districts. 2nd Trial Tr. at 247. The portions of the cities of Hampton and Newport News assigned to Districts 92 and 95 had substantially higher BVAP levels than the portions of

those cities assigned to neighboring non-challenged districts. Pl. Ex. 71 at 60. For example, the portion of Hampton assigned to District 92 had a 60.7% BVAP, compared to the 27.9% BVAP in the areas of Hampton assigned to non-challenged District 91. Pl. Ex. 71 at 60.

After considering the evidence as discussed below, we easily conclude that race was the predominant factor in the construction of Districts 92 and 95.

i.

We begin with District 95, which contained portions of the cities of Hampton and Newport News under both the 2001 and 2011 plans.[40] Pl. Ex. 50 at 69, 71. We conclude that the evidence overwhelmingly showed that race predominated in the construction of District 95.

Although District 95 had a high 61.6% BVAP, that district was the most underpopulated of all the challenged districts at the time of the 2010 census, with a population deficit of about 12,000 people. Pl. Ex. 50 at 72; Pl. Ex. 69 at 44. To add the thousands of residents required to equalize population, while still maintaining a minimum 55% BVAP, the legislature added a lengthy, narrow appendage to the northwest edge of the district. Pl. Ex. 69 at 46. This appendage caused a significant reduction in the compactness of District 95, leading to the worst compactness score in the entire 2011 plan. Pl. Ex. 50 at 8 ¶ 16, 70; DI Ex. 94 at 14.

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[40] The incumbent in District 95, Mamye BaCote, did not testify at either trial. Parties' Stipulations ¶ 17, Dkt. No. 208.

Overall, the addition of the narrow appendage increased the number of split VTDs in District 95 from one in the 2001 plan to five in the 2011 plan.[41] Pl. Ex. 71 at 11, 50, 55. In all five instances, the BVAP of the portion of those VTDs allocated to District 95 was higher than the BVAP of the area allocated to a neighboring non-challenged district. Pl. Ex. 71 at 11 ¶ 54, 55. Accordingly, Dr. Palmer calculated a strong positive and statistically significant relationship between BVAP and the likelihood that a census block would be assigned to District 95. Pl. Ex. 71 at 11 ¶ 55. Dr. Palmer explained that a census block with a 75% BVAP was three times "more likely to be assigned to District 95" than a census block with a 25% BVAP. Pl. Ex. 71 at 11 ¶ 55. Dr. Palmer further determined that black residents previously located in non-challenged District 94 were seven times more likely to be moved into District 95 than white residents. Pl. Ex. 71 at 19 ¶ 101.

To achieve these racial disparities, this appendage followed a "narrow corridor through white neighborhoods in order to reach a corridor" of black residents along a major highway and an additional thoroughfare. Pl. Ex. 69 at 46. The legislature split nearly every VTD at the northern end of this corridor, separating white and black voters "with remarkable precision." Pl. Ex. 69 at 46. As Dr. Rodden explained, the legislature split the four northernmost VTDs in the

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[41] We observe that Dr. Ansolabehere found that District 95 had six split VTDs in the 2011 plan, compared to the five split VTDs noted by Dr. Palmer. *See* Pl. Ex. 50 at 16, 70. This discrepancy has no effect on our analysis, and we thus proceed to consider the data provided by Dr. Palmer.

new appendage, namely, Jenkins, Denbigh, Epes, and Reservoir, "precisely at the point where black neighborhoods transitioned to white neighborhoods." Pl. Ex. 69 at 47. Indeed, the legislature drew the boundary in some cases along small residential streets, with the effect of including in District 95 multi-family housing occupied by black residents on one side of a street while excluding white residents living on the other side of the same street. Pl. Ex. 69 at 48. The dot density maps produced by Dr. Rodden plainly illustrate the precision with which these VTDs were split by race. *See* Pl. Ex. 69 at 47. As previously explained, only population, race, and ethnicity data were available at the census block level to aid in the division of VTDs by census block, precluding any conclusion that these VTDs were split on any basis other than race.[42]

The narrow appendage added significant black population to District 95, which allowed the district to "donate" BVAP to neighboring challenged District 92. Pl. Ex. 69 at 45, 48; 2nd Trial Tr. at 231. Accordingly, despite the 12,000-person population deficit in District 95, that district still *transferred* over 18,000 people into

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[42] Morgan testified at length about his decisions to split the Reservoir, Epes, Denbigh, and Jenkins VTDs at the northern end of the narrow appendage. According to Morgan, his decisions were governed by two primary goals: (1) the need to equalize population in District 95, and (2) his desire to decrease Democratic voting strength in neighboring non-challenged District 93, by moving some heavily Democratic precincts from District 93 into District 95. 2nd Trial Tr. at 639-40, 675-79. Our prior conclusion that Morgan's testimony was not credible is well-illustrated here by the precision with which the VTDs in District 95 were split along racial lines, leaving no doubt that race was the legislature's predominant consideration.

District 92. Pl. Ex. 50 at 72; Pl. Ex. 71 at 45. As discussed further below, the legislature moved three heavily black VTDs from District 95 into District 92, which shift included over 6,000 black residents of voting age, allowing District 92 both to achieve population equality and to satisfy the 55% BVAP threshold. Pl. Ex. 63 at 113; Pl. Ex. 69 at 48-49; 2nd Trial Tr. at 242.

In light of this evidence, we conclude that race was the predominant factor underlying the construction of District 95. The shape of the district, including the drastic reduction in compactness from the 2001 plan, is suspicious on its face. *See Miller*, 515 U.S. at 913 (explaining that the bizarre shape of a district "may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines"). More importantly, however, we cannot conceive of any race-neutral explanation for the added appendage, in which multiple VTDs were split precisely with the effect of dividing neighborhoods based on race.[43]

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[43] In reaching this conclusion, we emphasize that race still may predominate even when a district has a starting BVAP considerably higher than 55%, as in Districts 92 and 95. As Dr. Rodden acknowledged, in such circumstances, there may be "many different ways to achieve the 55 percent target." 2nd Trial Tr. at 244. In the case of District 95, for example, the availability of other options to achieve the legislature's racial goal does not diminish our conclusion, based on stark circumstantial evidence, that the legislature added the appendage and split several VTDs predominantly on the basis of race.

ii.

We turn to consider District 92,[44] which was contained wholly within the city of Hampton in both the 2001 and 2011 plans. Pl. Ex. 50 at 69. We conclude that race predominated in the construction of District 92.

Like District 95, District 92 had a starting BVAP of over 60%, but was significantly underpopulated by about 9,000 people. Pl. Ex. 50 at 72; Pl. Ex. 69 at 46. At first glance, compliance with certain traditional districting factors improved in District 92 after the 2011 redistricting. In particular, the district's compactness score improved from the 2001 plan, and the number of split VTDs declined from three to zero. Pl. Ex. 50 at 70. However, this lack of actual conflict with traditional districting criteria is not dispositive of our predominance inquiry. *See Bethune-Hill*, 137 S. Ct. at 797-99 (rejecting proposition that "actual conflict" with traditional districting principles is a threshold requirement for a finding of predominance). Here, we have "compelling circumstantial evidence" of the legislature's predominant use of race in District 92. *Id.* at 799.

The evidence showed that the construction of District 92 was "intimately connected" with the plainly race-based decisions made in District 95. 2nd Trial Tr. at 229. As Dr. Rodden explained, we cannot "understand the districting decisions of one without thinking about the implications for the other" of the

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[44] Jeion Ward was the incumbent delegate in District 92. Parties' Stipulations ¶ 17, Dkt. No. 208. She did not testify at either trial.

two districts, with respect to the need for population as well as the fixed 55% BVAP threshold. 2nd Trial Tr. at 229.

Despite the severe underpopulation of both districts, District 92 received population exclusively from District 95. Pl. Ex. 50 at 73; Pl. Ex. 71 at 45. After District 95 gained additional population and BVAP from its racially designed northward appendage, three VTDs with high BVAPs were moved from District 95 into District 92, totaling nearly 16,000 people.[45] Pl. Ex. 63 at 112; Pl. Ex. 71 at 45; 2nd Trial Tr. at 242. This transfer of the Mallory, Forrest, and Kraft VTDs was sufficient on its own to rectify the population deficit in District 92, and, as noted above, included over 6,000 black voting-age residents. Pl. Ex. 63 at 113; 2nd Trial Tr. at 242. Without this donation of significant population from District 95, the legislature would have been forced to expand the boundaries of District 92 into heavily white precincts, negatively impacting the BVAP level of District 92. *See* Pl. Ex. 69 at 46, 48 (Rodden: "[A]ny approach that was even remotely based on traditional redistricting principles would have ended up adding a very substantial number of whites . . . [which] would have imperiled the 55 percent BVAP target.").

In sum, patently race-based maneuvers allowed District 95 to serve as a "donor" of population and BVAP to District 92, ensuring that the addition of thousands of people to District 92 would not decrease

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[45] The Wythe VTD also was transferred from District 95 to District 92. *See* DI Ex. 94 at 13-14. Wythe had a total population of 2,330, with a 17.6% BVAP. Pl. Ex. 63 at 113-14.

the BVAP of that district below 55%. Although District 92 appears to comply with certain traditional districting criteria, we find that race was "the actual consideration[] that provided the essential basis for the lines drawn." *Bethune-Hill*, 137 S. Ct. at 799. Accordingly, because the population moved into District 92 was controlled by the race-based decisions in District 95, we conclude that race was the predominant factor in the construction of District 92.

C.

And finally, we turn to consider the four remaining challenged districts, Districts 77, 80, 89, and 90, which were located in the South Hampton Roads area of Tidewater. Pl. Ex. 69 at 41. These four districts included all or parts of the cities of Chesapeake, Norfolk, Portsmouth, Suffolk, and Virginia Beach. Pl. Ex. 50 at 69.

The legislature faced a unique challenge in redrawing the districts in South Hampton Roads. One of the non-majority-minority districts in the 2001 map, District 87, was moved from the Tidewater area to Fairfax County in Northern Virginia to compensate for population growth in that region. 2nd Trial Tr. at 298-99. Additionally, like the challenged districts on the peninsula, Districts 77, 80, 89, and 90 were underpopulated, with limited options to gain significant population while retaining a BVAP over 55%. Pl. Ex. 50 at 72; Pl. Ex. 69 at 52. Districts 80 and 89 also had BVAP levels under 55% at the time of the 2010 census. Pl. Ex. 50 at 72. Accordingly, the legislature engaged in complicated population-shifting maneuvers to sweep concentrations of black residents into one of the challenged districts, and to respond to

the ripple effects of such population shifts throughout the region.

As in the Richmond/Tri-City region and on the peninsula, the prominent role of race in drawing the challenged districts in South Hampton Roads is apparent. Five cities in the region were split between a challenged and a non-challenged district. Pl. Ex. 71 at 16 ¶ 80. In all five cases, the portion of the city allocated to a challenged district had a "substantially higher BVAP" than the portion assigned to a non-challenged district. Pl. Ex. 71 at 16 ¶ 80, 59. In total, the areas of these five cities assigned to challenged districts had a 56.8% BVAP, whereas the areas of the cities assigned to non-challenged districts had a 20% BVAP. Pl. Ex. 71 at 16 ¶ 80. And under the 2011 plan, one neighborhood in downtown Norfolk was divided into three districts, and included a half-mile stretch of roadway running through District 89, into 90, returning to 89, moving into 80, and ending in 90. Pl. Ex. 69 at 51. This bizarre configuration plainly disregarded traditional districting principles.

Additionally, in five of the six cases involving the transfer of population from non-challenged districts to challenged districts, the area sent to a challenged district had a higher BVAP than the area retained in the non-challenged district. Pl. Ex. 71 at 18 ¶ 93. And conversely, in all four instances in which a challenged district had population transferred to a non-challenged district, the area moved out of the challenged district had a lower BVAP than that of the area retained in the challenged district. Pl. Ex. 71 at 18 ¶ 94.

The intervenors have offered numerous race-neutral explanations for certain line-drawing decisions in

South Hampton Roads that otherwise appear racially motivated. As discussed further below, we decline to credit the majority of these post hoc justifications because they are belied by the record. After reviewing the evidence, we conclude that race predominated in the construction of Districts 77, 80, 89, and 90.

i.

We first consider District 80, which was the "lynchpin" to the redistricting of South Hampton Roads. Pl. Ex. 69 at 52. We conclude that race was the predominant factor underlying the drawing of District 80.

In the 2001 plan, District 80 included portions of the cities of Chesapeake, Norfolk, and Portsmouth. Pl. Ex. 50 at 69. As a result of the 2011 redistricting, District 80 also gained a portion of the city of Suffolk, thereby spanning four split municipalities. Pl. Ex. 50 at 69, 71. James, the incumbent delegate representing District 80, testified at the second trial. 2nd Trial Tr. at 68. After observing his demeanor and considering his testimony, we find that James testified credibly.

At the time of the 2010 census, District 80 was underpopulated by more than 9,000 people, and had a BVAP of 54.4%. Pl. Ex. 50 at 72; Pl. Ex. 69 at 52. The geography and demographics of the surrounding area hampered the legislature's ability to replenish the needed population while achieving the 55% BVAP requirement. At that time, District 80 was surrounded by largely white areas along the water and to the west of the district. Pl. Ex. 64 at 15; Pl. Ex. 69 at 52-53; *see also* 2nd Trial Tr. at 249. On the eastern side of the district, District 80 shared a border with challenged

District 89, and a border with challenged District 77. Pl. Ex. 69 at 43; DI Ex. 94 at 8, 10. District 89 had a significant population deficit and an even lower BVAP than District 80. Pl. Ex. 50 at 72; *see also* 2nd Trial Tr. at 249-50.

To accommodate the interrelated needs of these challenged districts, the legislature removed more than 22,000 people from District 80, and replaced them with over 32,000 new residents. Pl. Ex. 50 at 73. As part of this population shift, the district shed about 14,000 people to neighboring non-challenged District 79. Pl. Ex. 71 at 20 ¶ 105. In that transfer, white residents were moved from District 80 to 79 at *three times the rate* of black residents, with a 29.4% BVAP in the transferred population. Pl. Ex. 71 at 20, 44. Overall, these huge population shifts decreased the compactness of District 80 and rendered the shape of the district bizarre on its face, resembling a sideways "S." *See Miller*, 515 U.S. at 913 (explaining that bizarre shape of a district may be "persuasive circumstantial evidence" of racial predominance); Pl. Ex. 50 at 70; DI Ex. 94 at 10.

To create this sideways "S," District 80 added Portsmouth VTDs 33 and 34, which were predominantly white. Pl. Ex. 63 at 124-25; DI Ex. 94 at 10. VTDs 33 and 34 acted as a westward "bridge" into the VTDs of 38, Taylor Road, Yeates, and Harbour View, located in Portsmouth, Chesapeake, and Suffolk respectively, all of which had large BVAP concentrations.[46] Pl. Ex. 63 at 106-07, 124-25, 127-28,

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[46] The dissent correctly notes that the Taylor Road and Harbour View VTDs had BVAP levels slightly under 50%. Dissent Op. at

133-34; Pl. Ex. 69 at 53; DI Ex. 94 at 10; 2nd Trial Tr. at 252. As Dr. Rodden explained, this "bridge" "correspond[ed] directly to race," and reached these black neighborhoods in the four other identified VTDs "by bringing in the smallest possible number of whites." *See* Pl. Ex. 69 at 53-54; DI Ex. 94 at 10. The westward extension also added an additional water crossing to the district. DI Ex. 94 at 10; 2nd Trial Tr. at 252. We find that this oddly shaped westward extension of District 80 was constructed primarily on the basis of race, and cannot be explained otherwise as reflecting the application of traditional redistricting principles.

Although District 80 had only one populated VTD that was split in the 2011 plan, the nature of that split exhibited a stark racial division. Pl. Ex. 50 at 70; Pl. Ex. 71 at 54. The BVAP of the portion of VTD Nine assigned to District 80 was over 98%, whereas the BVAP of the portion of that VTD assigned to District 79 was more than 30 percentage points lower. Pl. Ex. 71 at 54.

And finally, as previously discussed, we reject Jones' contention at the first trial that the incumbent James offered "significant input" regarding the drawing of District 80. 1st Trial Tr. at 348-49. James flatly contradicted this assertion at the second trial, testifying credibly that he had no input in the redistricting process. 2nd Trial Tr. at 71-73. Moreover,

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166-67 & n.42. Although these two VTDs were not majority-black, the BVAPs of these VTDs nevertheless far surpassed the single-digit BVAPs of the "bridge" VTDs. *See* Pl. Ex. 63 at 106-07, 124-25, 133-34.

Jones equivocated at the second trial regarding the extent to which the wishes of James influenced the line-drawing decisions in District 80.[47] 2nd Trial Tr. at 499.

In sum, after the 2011 redistricting, District 80 exhibited a shape that was bizarre on its face, experienced a significant reduction in compactness, and underwent massive population shifts showing distinct racial patterns. We find that the intervenors' proffered justifications for these apparently racially motivated changes are not credible.[48] We therefore conclude that race predominated in the drawing of District 80.

ii.

We turn to consider District 89,[49] which was contained entirely within the city of Norfolk in both the 2001 and 2011 plans, but nevertheless experienced a significant reduction in compactness after the 2011

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[47] We also observe that certain of the changes to District 80 plainly were not beneficial to James, such as the loss of the Berkley VTD discussed further below, where James most recently had won 96% of the vote. 2nd Trial Tr. at 251-52.

[48] Morgan also testified that certain decisions regarding the boundaries of District 80 were based on the preference of the incumbent in District 79, Johnny Joannou, who did not testify at the first trial and had died by the time of the second trial. 2nd Trial Tr. at 653-56. Although, as previously explained, we do not credit Morgan's testimony, an incumbent's preference is not mutually exclusive with a finding of racial predominance.

[49] District 89 was represented by incumbent Delegate Kenneth Alexander, who did not testify at either trial. Parties' Stipulations ¶ 17, Dkt. No. 208.

redistricting. Pl. Ex. 50 at 69-70. We conclude that race was the predominant factor in the construction of District 89.

As in District 80, District 89 began with a BVAP under the 55% threshold. Pl. Ex. 50 at 72. Indeed, at the time of the 2010 census, District 89 had the lowest BVAP of any challenged district in the entire South Hampton Roads region, at 52.5%. Pl. Ex. 50 at 72. Also like District 80, District 89 was significantly underpopulated, and needed more than 5,700 additional people. Pl. Ex. 50 at 72; Pl. Ex. 69 at 55. The legislature therefore made several decisions to bolster both the overall population and the BVAP level of District 89, ultimately achieving a BVAP of only 55.5%. Pl. Ex. 50 at 72.

As a result of the legislature's race-based maneuvers, there was a strong positive and statistically significant relationship between the BVAP of a census block and its likelihood of being assigned to District 89. In particular, a census block with a 75% BVAP was 2.9 times more likely to be allocated to District 89 than a census block with only a 25% BVAP. Pl. Ex. 71 at 11 ¶ 52, 51.

As in many other challenged districts, the legislature demonstrated its racial motive in the way certain VTDs were split. In two of the three VTDs split between District 89 and a neighboring non-challenged district, the portion of the VTD allocated to District 89 had a higher BVAP than the portion allocated to the

non-challenged district.[50] Pl. Ex. 71 at 10 ¶ 50. The 2011 plan also split the Brambleton VTD between challenged Districts 89 and 90. Pl. Ex. 71 at 56. This change resulted in over 4,000 people, with a 96% BVAP, being split between the two challenged districts, and more than 1,000 black voting-age residents being moved into District 89. Pl. Ex. 71 at 12-13 ¶ 64, 56. Although the Brambleton VTD previously was contained entirely within challenged District 90, this split was required for District 89 to achieve the 55% BVAP threshold. Pl. Ex. 71 at 12-13 ¶ 64. As Dr. Palmer explained, if District 89 had not received its portion of Brambleton, the BVAP of the district would have fallen to 54.7%. Pl. Ex. 71 at 12-13 ¶ 64.

In addition to Brambleton, District 89 received the predominantly black Berkley VTD from District 80. Pl. Ex. 63 at 121-22; Pl. Ex. 69 at 55; DI Ex. 94 at 11; 2nd Trial Tr. at 260. District 89 had been located entirely north of the Elizabeth River in the 2001 plan. Pl. Ex. 69 at 55; DI Ex. 94 at 11. The addition of Berkley to District 89, however, added a water crossing to District 89 in order to reach that single VTD. Pl. Ex. 69 at 55; DI Ex. 94 at 11. In our view, the reason for the transfer of the Berkley VTD is clear: Berkley had a BVAP of over 95%, totaling over 2,200 voting-age black residents. Pl. Ex. 63 at 121-22.

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[50] The single exception to this pattern is the Zion Grace VTD, in which the portion of the VTD assigned to District 89 had a lower BVAP than the portion assigned to non-challenged District 79. Pl. Ex. 71 at 11 ¶ 51. Notably, however, the Zion Grace VTD assigned a very small portion of its population to District 89. Pl. Ex. 71 at 11 ¶¶ 51, 54.

In contrast to gaining the heavily black Berkley VTD on the south side of the district, District 89 lost the largely white Suburban Park VTD on the north side. *See* Pl. Ex. 63 at 121-22; DI Ex. 94 at 11; 2nd Trial Tr. at 255. These two VTDs had similar overall populations, but differed in their racial composition. Pl. Ex. 63 at 121. Additionally, the legislature split the Granby VTD, which bordered Suburban Park, with minute precision to include black residents in District 89 while excluding white Granby residents. Pl. Ex. 69 at 58; 2nd Trial Tr. at 256-57. This race-based population split was accomplished in the Granby VTD by the legislature adding to District 89 an appendage encompassing significant numbers of black residents, while carving a sliver out of the middle of the Granby VTD to exclude a narrow band of white residents.[51] Pl. Ex. 69 at 57-58; DI Ex. 94 at 11. We agree with Dr. Rodden's assessment that it was "very unlikely" that the legislature would have achieved this precise racial split of the Granby VTD as a coincidental side effect of equalizing population. 2nd Trial Tr. at 256.

In conclusion, like many other challenged districts, the legislature moved VTDs in and out of District 89 based on racial composition, and split VTDs clearly along racial lines, in order to achieve the 55% BVAP threshold. We find that these racial patterns were not coincidental to the attainment of traditional districting

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[51] Although Jones testified at the first trial that he drew this oddly shaped northern boundary of District 89 to include a business owned by the incumbent, that business was actually located in the Suburban Park VTD that was removed from the district. 2nd Trial Tr. at 257. Jones conceded at the second trial that he was mistaken about the location of the business. 2nd Trial Tr. at 504-05.

goals, but that the legislature was motivated primarily by race in drawing the boundaries of District 89. For these reasons, we conclude that race was the predominant factor in the construction of District 89.

iii.

We now consider the role of race in the configuration of District 77, the third challenged district in South Hampton Roads. Like Districts 80 and 89, we conclude that race predominated in the construction of District 77.

In both the 2001 plan and the 2011 plan, District 77 included portions of the cities of Suffolk and Chesapeake, connected by a narrow east-west corridor in the middle of the district. Pl. Ex. 50 at 69; DI Ex. 94 at 8. District 77 already had an odd shape and an extremely low compactness score under the 2001 plan. Pl. Ex. 50 at 70; DI Ex. 94 at 8. The boundaries of the 2001 version of District 77 extracted black residents from Chesapeake, "divide[d] [black residents] in suburban Portsmouth into two segments so as to share them between Districts 77 and 80," and extended into Suffolk so that black residents "on one side of town were separated from whites on the other." Pl. Ex. 69 at 62; *see also* 2nd Trial Tr. at 266. District 77 retained this general shape and low compactness score in the 2011 plan. Pl. Ex. 50 at 70; DI Ex. 94 at 8.

At the time of the 2010 census, District 77 had a BVAP of 57.6%, and was the least underpopulated of the challenged districts in Hampton Roads, with a population deficit of about 3,000 people. Pl. Ex. 50 at 72. Despite this relatively minor underpopulation, the legislature moved more than 18,000 people out of

District 77, and replaced them with about 21,000 others. Pl. Ex. 50 at 73. The legislature engaged in this large population shift to account for the ripple effect of the 55% BVAP threshold throughout South Hampton Roads, and particularly to ensure that both District 77 and neighboring challenged District 90 met the 55% BVAP requirement.

Initially, four largely white Chesapeake VTDs in District 90 were transferred to District 77, namely, Oaklette, Tanglewood, Indian River, and Norfolk Highlands. Pl. Ex. 63 at 106-07; 2nd Trial Tr. at 266-68. This removal of white residents from District 90 was necessary for that district to attain a 55% BVAP. Pl. Ex. 69 at 64-65, 67.

To compensate for this influx of white residents from District 90, District 77 lost four other majority-white VTDs, namely, Westover, Geneva Park, River Walk, and E.W. Chittum School. Pl. Ex. 63 at 106-07, 109-10; Pl. Ex. 69 at 65; DI Ex. 94 at 8; 2nd Trial Tr. at 269. By removing the Geneva Park VTD, the already-narrow corridor linking the Chesapeake and Suffolk portions of the district narrowed further, to a half-mile in width. Pl. Ex. 69 at 66. As a result of this narrowing, no east-west roads within District 77 connected the eastern and western parts of the district. Pl. Ex. 69 at 66; 2nd Trial Tr. at 271; *see Page*, 2015 WL 3604029, at *11 (explaining that the presence of "irregularities in the application" of the contiguity principle may be "circumstantial evidence . . . that contributes to the overall conclusion that the district's boundaries were drawn with a focus on race"). This east-west corridor "generate[d] the starkest possible segregation of blacks and whites." Pl. Ex. 69 at 67. District 77 needed to

retain the high BVAP Suffolk VTDs of Southside, Hollywood, and White Marsh to achieve a 55% BVAP. Pl. Ex. 63 at 133-34; Pl. Ex. 69 at 66. Accordingly, District 77 had to maintain some minimal connection between the Chesapeake and Suffolk precincts to remain a contiguous district. *See* DI Ex. 94 at 8.

We reject the intervenors' contention, asserted by Jones at the first trial, that some changes to the Chesapeake portion of the district were made at the request of the District 77 incumbent, Delegate Lionell Spruill Sr. Parties' Stipulations ¶ 17, Dkt. No. 208. According to Jones, Spruill requested that the city of Old South Norfolk be reunited into District 77 by moving certain precincts into the district. 1st Trial Tr. at 334-37. In addition to our reservations about the inconsistencies and stark variations in Jones' testimony between the first and second trials, we decline to credit this explanation given by Jones for independent reasons. First, and notably, despite relying heavily on Spruill's alleged input, the intervenors failed to call him as a witness at either trial to corroborate their theory. And second, this reunification did not actually occur. District 77 *lost* the low-BVAP Westover VTD, which also had been part of Old South Norfolk. Pl. Ex. 69 at 64; 2nd Trial Tr. at 268.

And finally, as in other challenged districts, the overall population data and race-based splits of VTDs illustrate the prominence of the legislature's racial motive. *See* 2nd Trial Tr. at 274. There was a positive and statistically significant relationship between the BVAP of a census block and the likelihood of that census block being assigned to District 77. A census

block with a 75% BVAP was 2.5 times more likely to be assigned to District 77 than a census block with a 25% BVAP. Pl. Ex. 71 at 10 ¶ 45. Additionally, in both the VTDs split between District 77 and a non-challenged district, the portion allocated to District 77 had a much higher BVAP than the portion assigned to the neighboring non-challenged district. Pl. Ex. 71 at 54. For example, in the Suffolk VTD of Lakeside, the BVAP of the portion of the VTD allocated to District 77 was 79.4%, while the BVAP of the area assigned to non-challenged District 76 was 36.1%. Pl. Ex. 71 at 54. In the case of another split VTD, District 77 received 75% of the population of the John F. Kennedy VTD, but received 96% of the BVAP. Pl. Ex. 71 at 10 ¶ 44, 33.

Overwhelming evidence supports our conclusion that the legislature predominantly relied on race in constructing District 77. To the extent that the district retained lines that previously were drawn based on race, we infer that race similarly influenced the legislature's decision to retain those lines. *See generally Miller*, 515 U.S. at 916 (explaining that the focus of the predominance analysis is whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district"). The creation of an exceptionally narrow corridor to connect pockets of black residents in two cities, without including an avenue for constituents or delegates to travel along that corridor, is strong evidence that the legislature subordinated traditional districting criteria to race.

iv.

We conclude our evaluation of South Hampton Roads with District 90. Because the redistricting

decisions made in that district were integrally connected with the race-based decisions made elsewhere in South Hampton Roads, we conclude that race predominated in the drawing of District 90.

In the 2001 plan, District 90 included portions of the cities of Chesapeake, Norfolk, and Virginia Beach. Pl. Ex. 50 at 69. After the 2011 redistricting, District 90 lost its precincts located in Chesapeake, and thus covered only two split municipalities. Pl. Ex. 50 at 69. The district also improved in compactness in the 2011 plan, and retained the same number of split VTDs. Pl. Ex. 50 at 70.

As previously discussed with respect to District 92, however, these consistencies with traditional districting criteria do not end our analysis of racial predominance. *See Bethune-Hill*, 137 S. Ct. at 798-99. Instead of limiting our inquiry to the shape of a district, we look to "the actual considerations that provided the essential basis for the lines drawn." *Id.* at 799.

At the time of the 2010 census, District 90 was significantly underpopulated by nearly 9,000 people, and had a BVAP of 56.9%. Pl. Ex. 50 at 72; Pl. Ex. 69 at 59. District 90 shared a border with two other challenged districts, namely, Districts 77 and 89. Pl. Ex. 69 at 43; DI Ex. 94 at 12. Consistent with the pattern seen elsewhere in South Hampton Roads, more than 18,000 people were moved out of District 90, and were replaced by nearly 28,000 others. Pl. Ex. 50 at 73.

We already have discussed specific population shifts involving District 90, which we will reiterate briefly here. These shifts ensured that either District 90 or

another one of the challenged districts in the area attained both population equality and a minimum 55% BVAP. 2nd Trial Tr. at 265.

First, District 90 lost the heavily white VTDs of Oaklette, Tanglewood, Indian River, and Norfolk Highlands to District 77, forcing the shedding from District 77 of other areas with significant white population. Pl. Ex. 63 at 106-07; Pl. Ex. 69 at 64-65; 2nd Trial Tr. at 266-68. The BVAP of District 90 would have dropped below 55% had District 90 retained the white population contained in these VTDs. Pl. Ex. 69 at 67.

Second, although the Brambleton VTD previously had been located wholly within District 90, the VTD was split in the 2011 plan between Districts 90 and 89. Pl. Ex. 71 at 12-13 ¶ 64. The Brambleton VTD had a large overall population and a 96% BVAP, without which District 89 could not have reached the 55% BVAP threshold. Pl. Ex. 71 at 12-13 ¶ 64. Overall, by transferring 4,000 people from District 90 to District 89, including a portion of Brambleton and a neighboring overwhelmingly black VTD, District 89 gained population with a 94.1% BVAP. Pl. Ex. 63 at 121-22; Pl. Ex. 71 at 44; DI Ex. 94 at 11-12.

Like many other challenged districts, the legislature also split VTDs between District 90 and non-challenged districts precisely along racial lines. 2nd Trial Tr. at 264. In all three such cases, the portion of the split VTD allocated to District 90 had a higher BVAP than the portion allocated to a neighboring non-challenged district. Pl. Ex. 71 at 54. Notably, for example, the BVAP of the portion of the Aragona VTD in District 90 was 61.6%, compared with the 19% BVAP in the

portion of Aragona assigned to non-challenged District 85. Pl. Ex. 71 at 54. Dr. Rodden's dot density maps illustrate the specificity with which the Aragona, Shell, and Reon VTDs were split to separate black and white populations. Pl. Ex. 69 at 60-61; 2nd Trial Tr. at 263-64.

And finally, we reject the intervenors' contention that any lines in District 90 were drawn at the request of Howell, the incumbent delegate. Although Howell was a member of the House redistricting subcommittee, he testified at the second trial[52] that he played a minimal role in the 2011 redistricting process. 2nd Trial Tr. at 82. Directly contrary to Jones' testimony at the first trial, Howell stated that he did not have "extensive input" into the drawing of his or any other district, but instead had a single discussion with Jones about District 90 only after the map was drawn. 1st Trial Tr. at 338-39, 343; 2nd Trial Tr. at 82-83. We credit Howell's testimony on this point over Jones' account.

The ripple effect of population and BVAP needs throughout South Hampton Roads heavily influenced the drawing of District 90. To ensure that District 90 and the other challenged districts all could achieve the 55% BVAP threshold, District 90 was required to incorporate population movements and split VTDs that were configured on a racial basis. Although, like District 92, District 90 appeared to comply with some traditional districting criteria, we find that the "actual considerations" the legislature used to draw District 90 were based on race, not on traditional districting goals.

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[52] Howell did not testify at the first trial.

Bethune-Hill, 137 S. Ct. at 799. Accordingly, we conclude that race was the predominant factor in the drawing of District 90.

D.

Our conclusion that race predominated in the construction of the 11 remaining challenged districts is not altered by the intervenors' post hoc justifications. *See id.* ("The racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not post hoc justifications the legislature in theory could have used but in reality did not." (emphasis omitted)). As discussed above, during the first trial, the intervenors defended against the plaintiffs' assertion of racial predominance by denying the use of a fixed 55% BVAP target. *See* 1st Trial Tr. at 280-81, 406, 409. That issue has been decided against the intervenors and is now settled. *See id.* at 795-99; *supra* pp. 17-18.

Bound by the 55% BVAP requirement, the intervenors have not produced a consistent theory otherwise to explain the apparently race-based boundaries of the 11 remaining challenged districts. The intervenors rely heavily on the fact that many of the challenged districts were severely underpopulated and required significant population shifts to achieve equal population. *See, e.g.*, 2nd Trial Tr. at 476. The intervenors also contend that VTDs were split at the end of the redistricting process for the purpose of equalizing population. DI Post-Trial Br. at 13.

Although the need for population redistribution in the challenged districts was undisputed, the need for population equalization does not explain why the

legislature selected certain boundary lines over others. The Supreme Court has been very clear that

> an equal population goal is not one factor among others to be weighed against the use of race to determine whether race "predominates." Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met.

Alabama, 135 S. Ct. at 1270. Accordingly, to determine whether race predominated, we consider "whether the legislature placed race above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*." *Id.* at 1271 (internal quotation marks omitted). We therefore reject the intervenors' reliance on population equalization as a factor weighing against the use of race in the creation of the challenged districts.

We similarly reject the intervenors' claim, advanced at the second trial, that "core retention"[53] was the legislature's primary redistricting consideration. *See* DI Post-Trial Br. at 18-19. Core retention is a necessary feature of nearly every redistricting, unless a district is moved entirely, because a new district necessarily will involve at least some change to the original geography. For example, a district with 90% core retention still

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[53] At the first trial, the intervenors' expert, Dr. M.V. Hood, III, defined "core retention" as "the percentage of the new district that is comprised of the former district," or "how many constituents the member took across the election cycle with them to their new district." 1st Trial Tr. at 597, 612-13; *see also infra* note 60.

may have selected the remaining 10% of its population based exclusively on race. Accordingly, core retention tells us very little about "*which* voters the legislature decides to choose" in shifting its boundaries, and thus "is not directly relevant to the origin of the *new* district inhabitants." *Id.*

E.

In summary, after "exercis[ing] [the] extraordinary caution" required of our predominance inquiry, we find as a matter of fact that the legislature subordinated traditional districting criteria to racial considerations. *Bethune-Hill*, 137 S. Ct. at 797 (citation omitted); *see also Abbott*, slip op. at 21. We therefore conclude that race predominated in the construction of all the 11 remaining challenged districts.

In reaching this conclusion, we emphasize several salient points. Critical to our analysis is our decision not to credit Jones' testimony, and our determination that Morgan's testimony was wholly lacking in credibility. These adverse credibility findings are not limited to particular assertions of these witnesses, but instead wholly undermine the content of Jones' and Morgan's testimony. As the dissent acknowledges, our credibility findings are "outcome-determinative" in this case. Dissent Op. at 94.

We nevertheless recognize that race was not the only factor that the legislature used in fashioning the challenged districts, and that the legislature relied on traditional districting criteria in making certain line-drawing decisions. However, the existence of race-neutral explanations for specific district lines is not dispositive of our predominance inquiry, under which

we apply a "holistic analysis" to determine "the legislature's predominant motive for the design of the district *as a whole*." *Bethune-Hill*, 137 S. Ct. at 800 (emphasis added). The Supreme Court has cautioned that "any explanation for a particular portion of the lines . . . must take account of the districtwide context." *Id.* And, as discussed above, the legislature may achieve a legitimate districting goal while also predominantly relying on race, as "actual conflict" with traditional principles is not required to prove predominance. *Id.* at 797-98.

As part of our holistic analysis, we observe that the fates of the 11 remaining challenged districts in this case were inextricably intertwined. Due to their starting population and BVAP, some of the challenged districts were able to serve as "donors" of BVAP and population to nearby challenged districts. Other districts, faced with deficits in these areas, received BVAP and population from other districts in order to achieve a 55% BVAP. Sometimes, multiple challenged districts in a region split areas with substantial black populations in order to boost each district's BVAP. *See, e.g.*, Pl. Ex. 71 at 12-13 ¶ 64. Conversely, challenged districts split predominantly white areas so as to disperse the white population and not unduly dilute the BVAP of a challenged district. *See, e.g.*, Pl. Ex. 71 at 12 ¶ 62; 2nd Trial Tr. at 41-42, 59. In light of this interconnectedness between districts, we have considered the effects of racial maneuvers made in one challenged district on other challenged districts in the region.

Common to all the challenged districts, however, was the legislature's application of "an express racial

target" of 55% BVAP. *Bethune-Hill*, 137 S. Ct. at 800. Although not dispositive to our predominance determination, this fixed target is evidence of the legislature's consideration of race. *See id.*; *Alabama*, 135 S. Ct. at 1267 (explaining that when a state legislature "expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria," this use of a racial target "provides evidence that race motivated the drawing of particular lines").

The evidence presented at trial showed that this 55% BVAP threshold had a predominating impact on the manner in which lines were drawn in each of the challenged districts. In general, the legislature was constrained in its ability to achieve the 55% threshold while equalizing population in each district, given the severe underpopulation of at least one district in each region and the geographic dispersal of high-BVAP areas. Accordingly, the legislature shifted huge numbers of voters between districts, in some cases replacing thousands of voters in adequately populated districts with the same number of new voters. *See* Pl. Ex. 50 at 72-73. These population shifts frequently exhibited "stark splits in the racial composition of populations moved into and out of disparate parts of the district." *Bethune-Hill*, 137 S. Ct. at 800; *see* Pl. Ex. 50 at 77.

In addition to these overall population figures, the legislature also engaged in a distinct pattern of splitting VTDs to divide concentrations of black and white voters, assigning portions of VTDs with large concentrations of black voters to challenged districts, and allocating heavily white areas to neighboring non-

challenged districts. We find entirely lacking in credibility the intervenors' explanation that these splits were made for any reason other than race. In our view, the precision with which such splits separated neighborhoods based on racial make-up, including dividing a VTD down the middle of a street, speaks for itself. *See* Pl. Ex. 69 at 38-39 & Figure 12, 47. Such a precise racial segregation of voters was not the result of happenstance.

To the extent that the intervenors assert that partisan advantage rather than race explains some of these VTD splits, we also reject this argument. We again emphasize that we do not find Morgan's explanations for his line-drawing decisions credible. And critically, political party performance data was *not available* to the map-drawers at the census block level. Accordingly, if the legislature sought to achieve partisan advantage by splitting VTDs, the legislature did so by using race as a proxy for political affiliation. Indeed, the intervenors' expert Dr. Katz explicitly endorsed use of race, due to the correlation between race and political preference, as the foundation for "partisan" line-drawing decisions. *See supra* note 24.

Moreover, we credit Dr. Palmer's unequivocal conclusion that race rather than party predominated in the challenged districts, because "the effect of race is much larger than that of party in the assignment of VTDs to challenged districts." Pl. Ex. 71 at 24 ¶¶ 123, 125. In fact, Dr. Palmer discovered "no substantive effect of Democratic vote share on the assignment of a VTD to a challenged district." Pl. Ex. 71 at 24 ¶ 123; *see also* Pl. Ex. 71 at 63. Based on this evidence, we hold that the legislature's reliance on race as a proxy for

political affiliation is subject to strict scrutiny. *Bush*, 517 U.S. at 968-73 (principal opinion of O'Connor, J.).

And finally, the plaintiffs produced credible anecdotal evidence corroborating the pattern of racial predominance illustrated by the statistical data. Most notably, McClellan and McQuinn testified unequivocally that certain changes to Districts 71 and 70 were made for the express purpose of increasing the BVAP of District 71 to achieve the 55% threshold. 2nd Trial Tr. at 36, 39, 103-04. Dance similarly testified that she received certain predominantly black areas, including a portion of the racially divided city of Hopewell, for the purpose of increasing the BVAP of District 63. 2nd Trial Tr. at 112, 116-17. This and similar testimony is "direct evidence going to legislative purpose," showing "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Alabama*, 135 S. Ct. at 1267 (quoting *Miller*, 515 U.S. at 916).

V.

Because we conclude that the plaintiffs have established racial predominance, we must evaluate whether the intervenors have shown that the "districting legislation is narrowly tailored to achieve a compelling interest." *Bethune-Hill*, 137 S. Ct. at 801 (quoting *Miller*, 515 U.S. at 920). Assuming without deciding that compliance with Section 5 of the VRA is a compelling state interest, we consider whether the intervenors have met their burden to show that the legislature had a "strong basis in evidence" for its predominant use of race in the challenged districts. *Alabama*, 135 S. Ct. at 1274 (citation omitted). In other

words, the intervenors were required to prove that the legislature had "good reasons to believe" that its use of race was required to comply with Section 5. *Id.* (citation and emphasis omitted).

At the time of the 2011 redistricting, Section 5 prohibited the legislature "from adopting any districting change that would 'have the effect of diminishing the ability of [members of a minority group] to elect their preferred candidates of choice.'" *Bethune-Hill*, 137 S. Ct. at 801 (quoting 52 U.S.C. § 10304(b)). The Department of Justice mandated that the legislature engage in a "functional analysis of the electoral behavior within the particular . . . election district" to determine the proportion of black voters necessary to achieve Section 5 compliance in that district. *Id.* (quoting *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7471 (2011)). With this standard in mind, we turn to consider the evidence underlying the legislature's decision to apply the 55% BVAP requirement to the challenged districts.

As an initial matter, we find that the legislature's application of a single, "mechanically numerical" 55% BVAP requirement to all 12 challenged districts strongly suggests that the legislature did not engage in narrow tailoring. *See Alabama*, 135 S. Ct. at 1273. The 12 challenged districts were highly dissimilar in character, spanning four large geographic regions of the state, including varied urban, suburban, and rural areas. As discussed further below, the 12 districts also exhibited significant differences in Democratic voting strength, electoral history, and the extent to which white and black voters supported the same candidates.

The legislature nevertheless adopted an across-the-board BVAP threshold irrespective of these defining differences.

After the first trial, this Court found that the source of the 55% threshold was "an analysis of [District] 75 itself." *Bethune-Hill*, 141 F. Supp. 3d at 558. On appeal, the Supreme Court affirmed this Court's conclusion that the intervenors adequately justified the use of the 55% BVAP in District 75, based on Jones' "functional analysis" of the conditions in that district. *See Bethune-Hill*, 137 S. Ct. at 801-02. The Supreme Court reiterated this Court's finding that the 55% figure was chosen "based largely on concerns pertaining to the re-election of [the incumbent] in District 75." *Id.* at 796 (brackets omitted) (quoting 141 F. Supp. 3d at 522).

In contrast to this "functional analysis" of District 75, the intervenors produced no evidence at either trial showing that the legislature engaged in an analysis of *any* kind to determine the percentage of black voters necessary to comply with Section 5 in the 11 remaining challenged districts. Jones admitted as much, testifying that, among other things, he did not compile recent election results in all the challenged districts, 1st Trial Tr. at 453, did not consider that the majority-minority districts in the 2011 state Senate map all had less than 55% BVAP, 1st Trial Tr. at 468, did not examine other plans that were precleared or rejected by the Department of Justice, 1st Trial Tr. at 469, and did not conduct an analysis to determine whether white and black voters tended to vote for the same candidates, or exhibited polarized voting behavior, in any of the challenged districts, 1st Trial Tr. at 469; 2nd Trial Tr. at 570. Moreover, the intervenors did not produce a

single member of the black caucus at either trial to testify that the 55% BVAP requirement was imposed to allow black voters in those districts to elect a candidate of their choice.[54]

Rather than conducting an individualized assessment of each district, Jones applied the 55% figure from District 75 across the board to all the challenged districts. 2nd Trial Tr. at 566. In doing so, Jones conceded that he did not compare the other districts with District 75 on factors relevant to black voters' ability to elect their preferred candidates. 2nd Trial Tr. at 566-68. Nor did Jones consider whether the 11 other challenged districts shared a feature of District 75 he deemed crucial to that district's BVAP needs, namely, the presence of a substantial non-voting prison population. 2nd Trial Tr. at 565-66, 569-70.

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[54] Jones suggested that he spoke with the incumbent delegates in the challenged districts regarding what BVAP percentage would be needed to avoid retrogression under Section 5. 2nd Trial Tr. at 570. Contrary to this contention, however, every member of the black caucus who testified stated that they never told Jones that a 55% BVAP was required in their districts. 2nd Trial Tr. at 54, 72, 85-86, 107, 110, 121, 131-32, 139. McClellan further testified that she did not believe that a 55% BVAP was necessary in District 71. 2nd Trial Tr. at 54.

To the extent that Jones relied on Spruill's views to justify the 55% BVAP threshold, we again emphasize that the intervenors declined to call Spruill as a witness at either trial. Spruill's support of a high BVAP could well have been motivated by an interest in incumbency protection, rather than a good-faith attempt to comply with the VRA. *See* Pl. Ex. 35 at 141-48. And, in any event, the personal opinion of a single delegate cannot constitute the "strong basis in evidence" necessary to satisfy strict scrutiny in 12 districts. *See Alabama*, 135 S. Ct. at 1274.

Instead, Jones assumed that the BVAP required in District 75 would be appropriate in all 12 challenged districts. 2nd Trial Tr. at 566-68. This lack of an individualized assessment is strong evidence that the legislature did not have "good reasons to believe" that the 55% BVAP threshold was required in the 11 remaining districts. *See Alabama*, 135 S. Ct. at 1274.

We further observe that District 75 differed in important ways from many of the other challenged districts. Notably, District 75 was located in the very rural Southside region of the state, and was the sole challenged district that shared a border with similar rural areas of North Carolina. *See* DI Ex. 94 at 7; 1st Trial Tr. at 319. Other than District 63, which bordered District 75 to the north, the remaining ten challenged districts were located in entirely different regions of the state. *See* DI Ex. 94. McClellan testified that District 71 and District 75 were not "remotely similar," pointing, among other things, to the fact that District 71 was a densely populated urban area in a city of more than 200,000 residents,[55] whereas District 75 is located in a rural region with a high population of prisoners who cannot vote. 2nd Trial Tr. at 53-54. McQuinn echoed these sentiments regarding the differences between Districts 70 and 75. 2nd Trial Tr. at 107.

Additionally, based on an ecological inference analysis conducted by Dr. Palmer, we find as a matter of fact that a 55% BVAP was not required in any of the 11 remaining challenged districts for black voters to

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[55] *See* U.S. Census Bureau, QuickFacts: Richmond City, Virginia, https://www.census.gov/quickfacts/fact/table/richmondcityvirginia county/RHI825216#viewtop (last visited June 18, 2018).

elect their preferred candidates.[56] *See* Pl. Ex. 71 at 24 ¶ 130. Dr. Palmer's analysis examined the extent to which white and black voters in each district chose the same candidates, and accordingly whether black voters could elect their preferred candidates with a BVAP level lower than 55%. Pl. Ex. 71 at 24-25 ¶¶ 126, 130. We find this testimony to be credible and adopt the following conclusions from Dr. Palmer's testimony and report.[57]

First, the 12 challenged districts, including District 75, varied widely in the extent to which white voters supported Democratic candidates, the party overwhelmingly preferred by black voters. *See* Pl. Ex.

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[56] We are satisfied with Dr. Palmer's methodology, including his decision to use statewide election data, rather than House of Delegates election results, to analyze racial voting patterns in the challenged districts. 2nd Trial Tr. at 416. The results of statewide elections were highly correlated with the results of House of Delegates elections. Pl. Ex. 71 at 25 ¶¶ 133-34; 2nd Trial Tr. at 416.

[57] We do not credit Dr. Katz's analysis on the issue of narrow tailoring. As explained more fully in this Court's prior dissenting opinion, we find unpersuasive Dr. Katz's "crude analysis" concluding that the 55% BVAP threshold was justified, because this BVAP level would produce an 80% likelihood of electing a black candidate. *See Bethune-Hill*, 141 F. Supp. 3d at 578-79 (Keenan, J., dissenting). Moreover, we observe that in his initial report for the first trial, Dr. Katz relied on the limited d ta available from House of Delegates elections only. DI Ex. 16 at 17. Recognizing that few such elections were competitive, making it "difficult to gauge meaningful differences in voter preferences," Dr. Katz expanded his analysis in the second trial to include statewide elections held in 2013. DI Ex. 101 at 2-6. We find the 2013 elections to be of limited relevance, however, as they occurred after the redistricting cycle at issue in this case.

71 at 26 ¶ 136; 2nd Trial Tr. at 421. Notably, in District 75, only 16% of white voters supported Democratic candidates, an extremely high level of racially polarized voting. Pl. Ex. 71 at 26 ¶ 137, 66. The next lowest level of white Democratic support was 27% in District 63, more than ten percentage points higher than in District 75. Pl. Ex. 71 at 66. And in District 71, 70% of white voters supported Democratic candidates, a high level of voting cohesion between the two racial groups. Pl. Ex. 71 at 26 ¶ 137, 66. This data clearly showed that District 75 differed in important ways from the remainder of the challenged districts, and that District 75 required the highest BVAP level of any district.[68]

Second, Dr. Palmer concluded unequivocally that a 55% BVAP was not needed in any of the 11 remaining challenged districts in order for black voters to be able to elect their preferred candidates. Pl. Ex. 71 at 27 ¶ 142; 2nd Trial Tr. at 429, 442. Indeed, even if the existing population deficits in these challenged districts had been remedied entirely with Republican voters, the Democratic vote share in each district still would well have exceeded 50%, with the lowest Democratic performance in District 63 (58%), and the highest in District 70 (79%). Pl. Ex. 71 at 67; 2nd Trial Tr. at 426-27.

Dr. Palmer also concluded, with 95% confidence, that a 55% BVAP in each of the 11 challenged districts would produce a Democratic vote share of at least 66.3% (in District 63), and as high as 83.7% (in District

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[68] District 75 also was the only challenged district in which candidates preferred by black voters did not consistently win by large margins. Pl. Ex. 71 at 26 ¶ 138.

71).[59] Pl. Ex. 71 at 68; 2nd Trial Tr. at 419. Even a 45% BVAP would have produced a strong Democratic majority in all 11 remaining challenged districts, ranging from 59.4% to 81%.[60] Pl. Ex. 71 at 68. Accordingly, the 55% BVAP threshold was far greater than necessary for black voters to continue electing

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[59] For the sake of simplicity in discussing Dr. Palmer's results, we use the "point estimates" for Democratic vote share listed in Table 25 of his report, rather than the upper or lower bounds of the confidence interval. *See* Pl. Ex. 71 at 68; 2nd Trial Tr. at 420, 428.

[60] The intervenors offered the testimony of Dr. M.V. Hood III, a professor of political science at the University of Georgia, who critiqued Dr. Palmer's conclusions regarding racial voting patterns and the necessity of the 55% BVAP threshold. *See* DI Ex. 103. We do not credit Dr. Hood's testimony for several reasons. First, like Dr. Katz, in conducting his ecological inference analysis, Dr. Hood relied on electoral results from 2013, which elections post-dated the 2011 redistricting process. DI Ex. 103 at 6-7, 12-13; *see* 2nd Trial Tr. at 818-20, 840-44.

Moreover, in general, Dr. Hood offered vague, unsubstantiated challenges to Dr. Palmer's conclusions. Most notably, Dr. Hood criticized Dr. Palmer's analysis on the basis that "an estimate produced by a statistical model is accompanied by a degree or range of uncertainty." DI Ex. 103 at 9. Contrary to this insinuation, Dr. Palmer expressly included confidence intervals in all of his statistical estimates. Pl. Ex. 71 at 68; Pl. Ex. 72 at 15. And ironically, Dr. Hood's *own* ecological inference results included no such measures of uncertainty. DI Ex. 103 at 7-8.

Dr. Hood also hypothesized that BVAP may drop over time in a challenged district, supporting this supposition with a single statistic about a decrease in BVAP in District 71 between 2012 and 2015. DI Ex. 103 at 111. He provided no analysis of the likelihood or extent of a decrease in BVAP expected at the time of the 2011 redistricting, or that the map-drawers employed such reasoning in 2011. Pl. Ex. 72 at 16 ¶ 42; DI Ex. 103 at 11.

their preferred candidates.[61] Pl. Ex. 71 at 27 ¶¶ 141-42; 2nd Trial Tr. at 428-30.

Our conclusion is not altered by the intervenors' argument that the 55% BVAP threshold was "close enough" to the BVAP required for each district to satisfy Section 5. In the intervenors' view, the Department of Justice's preclearance of the challenged districts itself establishes that this minimum BVAP was required under Section 5, thereby satisfying the intervenors' burden to show narrow tailoring. DI Post-Trial Br. at 34.

The intervenors misapprehend the posture of this case. Their burden to show narrow tailoring is not satisfied merely by invoking the legislature's prior obligation to obtain preclearance, or by satisfying the requirements imposed by the Department of Justice. *See Miller*, 515 U.S. at 922 (explaining that the state does not have a compelling interest in "complying with whatever preclearance mandates the Justice Department issues," and holding that when a state relies on the Department of Justice's "determination

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[61] We reject the intervenors' attempt to rely on a report written in 2001 by Dr. James Loewen during the course of litigation following a prior redistricting cycle. DI Ex. 103 at 22-61. Although Dr. Loewen provided a deposition in the present case, he did not testify at either trial. *See* Conformed Designated Discovery Ex. D, Dkt. No. 220-1. Dr. Loewen's report was not admitted into evidence independently, but Dr. Hood attached to his supplemental report a version of the Loewen report. *See* DI Ex. 103 at 22-61; 1st Trial Tr. at 387-89; Pl. Post-Trial Br. at 23. We decline to consider the Loewen report here because, among other reasons, the underlying data was based on electoral results from the 1990s and thus was outdated for purposes of the 2011 redistricting. 2nd Trial Tr. at 867, 871.

that race-based districting is necessary to comply with the [VRA], the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest"). We do not require that the legislature "determine precisely what percent minority population § 5 demands," nor did Dr. Palmer attempt to ascertain such a figure. *Alabama*, 135 S. Ct. at 1273 (emphasis omitted); 2nd Trial Tr. at 429-30. Instead, we merely ask whether the legislature had "good reasons to believe" that its use of race was justified. *Id.* at 1274 (emphasis omitted). Selecting a BVAP figure entirely without evidentiary foundation plainly does not satisfy this burden.

For the same reasons, we reject the intervenors' contention that because "[n]o one" presented the legislature with evidence of white crossover voting at the time of redistricting, the map-drawers thought that a 55% BVAP minimum was required to ensure non-retrogression under Section 5. DI Post-Trial Br. at 35. The intervenors once again attempt to sidestep their use of an unsupported, across-the-board racial threshold, by trying to shift their burden of proof onto the plaintiffs. Because it is the intervenors' burden to justify their predominant use of race, the intervenors also are responsible for the state's failure to seek relevant information at the time of the redistricting that would support the legislature's race-based decision. If we were to accept the intervenors' position, legislatures could pack black voters into majority-minority districts in perpetuity, claiming ignorance of the fact that high BVAP concentrations were not necessary to comply with Section 5. We decline to apply strict scrutiny in a manner that would promote a result

plainly incongruous with the purposes of the VRA and the Equal Protection Clause.

Accordingly, we hold that the legislature did not have a "strong basis in evidence" for its use of the 55% BVAP threshold in the 11 remaining challenged districts. *See id.* In reaching this conclusion, we recognize the challenge the legislature faced in attempting to comply with both the VRA and the Equal Protection Clause. *See Abbott*, slip op. at 4 (noting that "a legislature attempting to produce a lawful districting plan is vulnerable to competing hazards of liability" under the VRA and Equal Protection Clause) (citation and internal quotation marks omitted). We also appreciate the "delicate balancing of competing considerations" the legislature undoubtedly was required to do when drawing a 100-district plan, and the "serious intrusion" on local functions represented by our rejection of a state redistricting plan. *Bethune-Hill*, 137 S. Ct. at 797 (quoting *Miller*, 515 U.S. at 915); *Abbott*, slip op. at 21 (quoting *Miller*, 515 U.S. at 915).

Here, however, the legislature did not undertake *any* individualized functional analysis in *any* of the 11 remaining challenged districts to provide "good reasons to believe" that the 55% threshold was appropriate. *See Alabama*, 135 S. Ct. at 1274. The legislature instead applied the 55% BVAP requirement from District 75 across the board to 11 greatly dissimilar districts, which black-preferred candidates would have won by significant margins with far lower BVAP percentages. We thus easily conclude that the intervenors have not satisfied their burden to show that the legislature's predominant use of race was narrowly tailored to achieve a compelling state interest.

VI.

The Equal Protection Clause ensures that states do not "engage[] in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." *Miller*, 515 U.S. at 911-12 (internal quotation marks omitted) (quoting *Shaw*, 509 U.S. at 647). Overwhelming evidence in this case shows that, contrary to this constitutional mandate, the state has sorted voters into districts based on the color of their skin. The legislature made no effort to determine whether the mechanical 55% racial threshold was required to comply with the VRA, and instead arbitrarily applied the same racial mandate to 12 vastly dissimilar districts. This predominant use of race and disregard of narrow tailoring principles plainly are at odds with the guarantees of the Equal Protection Clause.

We therefore conclude that the 2011 Virginia House of Delegates redistricting plan violates the Equal Protection Clause. In light of the "powerful concerns for comity involved in interfering with the state's legislative responsibilities," we will afford the Virginia General Assembly a "reasonable opportunity . . . to meet constitutional requirements by adopting a substitute measure," rather than re-drawing the districts ourselves. *Page*, 2015 WL 3604029, at *18 (quoting *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978)). We therefore allow the Virginia General Assembly until October 30, 2018 to construct a remedial districting plan that rectifies the constitutional deficiencies identified in this opinion.

It is so ORDERED.

/s/
Barbara Milano Keenan
United States Circuit Judge

/s/
Arenda L. Wright Allen
United States District Judge

Richmond, Virginia
Date: June 26, 2018

Robert E. Payne, Senior District Judge, dissenting

Although I respect the views of my good colleagues in the majority, I dissent because I understand the record quite differently.

First, I assess the credibility of the relevant witnesses differently. Second, I disagree with the majority's view as to whether the Court may consider evidence that a map drawer sought to equalize population. Third, I find the majority's "statewide evidence" to be of limited value. And, finally, I do not believe that Plaintiffs' District-specific evidence supports a finding of racial predominance by a preponderance of the evidence. See Bethune-Hill v. Va. State Bd. of Elections, 141 F. Supp. 3d 505, 510, 547 (E.D. Va. 2015), aff'd in part, vacated in part, 137 S. Ct. 788, 802 (2017).

I. The Majority's Credibility Determinations

As the majority makes clear, the resolution of this case turns on credibility determinations which we, as the triers of fact, must reach respecting whether race

was the predominant reason for the design of the eleven Districts at issue on remand. I cannot subscribe to the credibility assessments that animate the majority on that outcome-determinative issue.

A. Delegate Steven Christopher Jones & John Morgan

The majority's conclusions as to whether race predominated in the Challenged Districts rely heavily on the fact that it declines to credit the testimony of Delegate Steven Christopher Jones and John Morgan. Maj. Op. at 78 ("Critical to our analysis is our decision not to credit Jones' testimony, and our determination that Morgan's testimony was wholly lacking in credibility."). As a result, the majority leaves no room to consider these witnesses' testimony. Maj. Op. at 78 ("These adverse credibility findings are not limited to particular assertions of these witnesses, but instead wholly undermine the content of Jones' and Morgan's testimony.").

I respectfully disagree with those credibility assessments and affirmatively find that the testimony of both Jones and Morgan was credible and supported by the record as a whole. Jones and Morgan were vitally important witnesses with critical first-hand knowledge of the 2011 redistricting process. As the majority observes, Jones was "the primary architect of the 2011 plan." Maj. Op. at 3. And, Morgan, who was hired to assist drawing District lines, was labeled "the finish carpenter" and "played a substantial role in constructing the 2011 plan." Maj. Op. at 31; 2nd Trial Tr. at 519, 593. That role included using mapping "software to draw district lines" and, "in most circumstances," splitting the Voting Tabulation

Districts ("VTDs") in the Challenged Districts (without Jones' input). Maj. Op. at 31; 2nd Trial Tr. at 519, 714.

i. Delegate Jones

With respect to Jones, the majority first determines that no aspect of his testimony was credible because, in the trial on remand, "Jones had a murky recollection regarding several important topics on which he previously had testified." Maj. Op. at 34. But, memories fade with time. I therefore cannot ascribe weight to the fact that Jones' recollection was more "murky" at the second trial (in 2017) than at the first trial (in 2015). Moreover, I find that Jones gave quite clear testimony at both trials as to the reasons for the District lines, the critical issue in the case.[1]

The majority also is of the view that Jones' testimony was not credible because "the testimony of multiple, credible witnesses at the second trial directly undermined much of Jones' prior key testimony" and Jones could not account for these "material inconsistencies." Maj. Op. at 34, 36. I cannot subscribe to this view, either. The examples of "multiple, credible witnesses" principally relied on for the majority view are Delegates Algie Howell and Matthew James. Maj. Op. at 34-35. These witnesses were members of the House of Delegates who, at the second trial, contradicted Jones' testimony, at the first trial, that they had given significant input into the redistricting plan. Maj. Op. at 34-35; 2nd Trial Tr. at 71-74, 82-84;

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[1] That is demonstrated in the District-by-District analysis in Part IV below. Therefore, it is not necessary to recount here the clarity and consistency of Jones' testimony as I understand it.

1st Trial Tr. at 339, 348-49. And, they offered, for the first time six years after the fact, recollections of conversations which the majority finds dispositive of Jones' credibility. Maj. Op. at 34-36, 34 n.27; see also 2nd Trial Tr. at 73-74, 82-84.

As an initial matter, I cannot accept on principle these long-delayed views of what happened in 2011. These witnesses could have testified in the first trial to correct any statements that they believed misrepresented their roles in the redistricting process. They did not then come forward to say that Jones was wrong. Moreover, during the redistricting debates, Delegate Lionell Spruill Sr. openly lauded Jones on the House of Delegates floor for answering the concerns of "mostly every member of the Black Caucus," and no delegate stood to refute that praise. See Pl. Ex. 35 at 142.[2] Under those circumstances, I cannot credit the revisionist testimony James and Howell offered at the second trial.[3]

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[2] Delegate Rosalyn Dance also commended Jones' extensive collaboration with other delegates during the redistricting process, describing him as "willing to listen to anything and everything we [Democrats] throw to him to consider." Pl. Ex. 33 at 43.

[3] The majority suggests that the reason why these witnesses waited to testify until the second trial is that they "were not needed until the second trial, when the plaintiffs had the opportunity to undermine the version of events that Jones had offered at the first trial." Maj. Op. at 35 n. 28. That view, I think, is wrong. As the majority opinion itself shows, the belated testimony of the delegates was directly responsive to what Jones said at the first trial about them and their Districts. See Maj. Op. at 34. The delegates therefore could have testified during Plaintiffs' rebuttal case at the first trial. Indeed, rebutting the testimony of a defendant's witnesses is the purpose of a rebuttal case.

Additionally, my conclusions as to the frailty of human memory apply with equal force to every delegate who testified at the second trial. Therefore, I am far more inclined to believe Jones' detailed and "voluminous testimony at the first trial explaining many of his line-drawing decisions," see Maj. Op. at 35, than any arguably contradictory statements offered years later.

Finally, the witnesses cited by the majority did not undermine any "key testimony" by given Jones. As detailed in my discussion of Districts 80 and 90,[4] Jones' reasons for the District lines hardly depended at all on the input of James and Howell. Thus, the majority is discrediting Jones on the basis of, at best, peripheral and inconsequential discrepancies, rather than "material inconsistencies."[5] Moreover, it is important to note that the transcripts of the regional hearings,

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[4] When I describe another portion of this opinion as addressing the matter presently being discussed "in greater detail" or the like, that portion of the opinion should be treated as having been incorporated in relevant part by reference. The issues in this case often cut across topics of discussion.

[5] The majority also refuses to credit any claim by Jones that he "relied on the consent of the black caucus based on comments Jones received from Delegate Lionell Spruill Sr." Maj. Op. at 34 n.27. The record, including Spruill's floor speech, his statements in the hearings, and the affirmative votes of the members of the Black Caucus, shows that Jones had the support of the Black Caucus; or, at least, reasonably thought he had. See, e.g., Pl. Ex. 32 at 12; Pl. Ex. 35 at 142; 2nd Trial Tr. at 51, 65, 77, 85, 108, 110; 1st Trial Tr. at 63, 88. In any event, the "support/consent" evidence is important only in measuring whether the majority's refusal to credit Jones' testimony is reasonable, not in assessing how the lines were drawn.

where they do address local situations such as the design of a District or VTD splits, support the trial testimony given by Jones on those issues.

ii. Morgan

With respect to Morgan, the majority considers his testimony unreliable for five reasons. First, it does so because his testimony included "purportedly race-neutral explanations for several [district] boundaries that appeared facially suspicious." Maj. Op. at 31. I cannot discern what explanations are thought to be suspicious, but, for reasons explained below in the District-by-District analysis, I think that the record reflects well-documented race-neutral explanations for how all the Challenged Districts were drawn.

Second, the majority says that "[t]he intervenors' belated reliance on Morgan's testimony [he did not testify at the first trial] strongly suggests an attempt at post hoc rationalization." Maj. Op. at 31. If that is a valid point as to Morgan, it would be equally valid to discredit the belated testimony of the delegates on whom the majority relies to discount Jones' testimony. But, unlike the situation with those delegates (who could have offered their refuting testimony at the first trial), Morgan's testimony was offered in direct response to the Supreme Court's clarification of the relevant legal standard (which was necessarily unavailable at the time of the first trial). See DI Pre-Trial Br. at 1-2. And, Plaintiffs' theory of the case at the first trial did not rely on the testimony of Dr. Rodden and his dot density maps respecting the shifts and splits in VTDs, which were offered to show "the surgical precision with which the General Assembly sorted black from white voters" and which Morgan was

uniquely equipped to refute. See Pl. Pre-Trial Br. at 1-2. And, of course, Dr. Rodden's theory was central to Plaintiffs' case this go-round. So, it made eminently good sense for Intervenors to have Morgan show how Dr. Rodden's theory did not square with reality.[6]

Third, the majority discounts Morgan's testimony because: "Dr. Palmer emphasized that to equalize population, typically only one VTD needed to be split between a pair of districts. Yet several of the challenged districts had multiple VTDs that were split with the same non-challenged district." Maj. Op. at 31-32 (citations omitted). The majority lists several examples of multiple VTDs split between Districts. Maj. Op. at 32. But, Morgan agreed that equalizing population generally only requires a single split between Districts. 2nd Trial Tr. at 664. And, he offered reasonable justifications for most of the majority's cited examples. See 2nd Trial Tr. at 639-40, 665-66, 677-79, 696-97, 709, 740, 745, 748-50, 757-60.[7]

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[6] In the first trial, Plaintiffs relied on the 55% threshold to prove racial predominance. See Bethune-Hill, 141 F. Supp. 3d at 523. Plaintiffs presented some expert evidence about VTD shifts and splits at the first trial, but that evidence was largely quantitative and did not resemble the way in which the VTD issue was presented at the second trial through Dr. Rodden. See Pl. Ex. 50 at 6-8.

[7] The exceptions are the two splits between Districts 89 and 79 (Zion Grace and Titustown Center), the two splits between Districts 77 and 76 (Lakeside and John F. Kennedy), and two of the splits between Districts 94 and 95 (Palmer and Deer Park). See Pl. Ex. 71 at 54-55; DI Ex. 91 at 154, 178, 190. Those splits are discussed below.

Fourth, the majority finds Morgan's testimony to be incredible because his "contention, that the precision with which [VTD] splits divided white and black areas was mere happenstance, simply is not credible." Maj. Op. at 32. But, many splits did not divide primarily African-American and white areas "with precision." See, e.g., Pl. Ex. 69 at 18 (505, 703), 25 (Davis, 410), 33 (Brookland), 53 (Nine), 56 (Zion Grace, Brambleton), 68 (Lakeside). And, more importantly, by the majority's logic, no witness could ever explain credibly why District lines were drawn so long as they appeared to encompass or exclude certain racial groups. Here, Morgan unequivocally testified that he did not review racial data in splitting VTDs, and he otherwise described in detail, quite credibly in my view, why VTDs were split for non-racial reasons. See, e.g., 2nd Trial Tr. at 639-40, 665-71, 677-80, 696-97, 699-702, 704-06, 708, 714-15, 740, 745, 748-50, 757-60. What else was he to say?[8]

Fifth, the majority rejects Morgan's testimony because it believes that he utilized race as a proxy for politics. It observes:

> Similarly, Morgan asserted that he split certain VTDs at the census block level in District 95 to increase Republican voting strength in a neighboring, non-challenged district. This contention conflicted with the testimony of Dr. Rodden and Dr. Palmer, as well

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[8] Additionally, Morgan was willing to admit that he relied on race in general when drawing District lines. 2nd Trial Tr. at 726; see also 2nd Trial Tr. at 726-28. That he did so supports the credibility of his denial of such reliance in a specific context, VTD splitting.

> as with the testimony of the intervenors' own expert, Dr. Thomas Hofeller, who uniformly stated that election results and partisan affiliation data were not available at the census block level. Indeed, Morgan conceded that he could only estimate political performance at the census block level by applying election results from the VTD as a whole equally to each census block. This "partisan" approach based on overall VTD performance, however, would not result in VTDs being split precisely to separate predominantly black and white neighborhoods. Accordingly, the only conclusion to draw from Morgan's testimony is that, insofar as he sought to obtain partisan political advantage by splitting VTDs in particular ways, he did so by relying on race as a proxy for political preference. This assumption that members of a particular racial group vote a certain way is antithetical to the principles underlying the Equal Protection Clause. Using race as a proxy for political performance constitutes the use of race, not the use of politics, for purposes of our predominance analysis. For these reasons, we conclude that Morgan did not present credible testimony, and we decline to consider it in our predominance analysis.

Maj. Op. at 32-34 (citations omitted).

This reasoning, however, is faulty because nothing in the record indicates that Morgan relied on race as a proxy in splitting the VTDs cited by the majority in the District (95) on which the credibility determination is based. This matter is addressed in greater detail in the

discussion of District 95, infra. Suffice it to say, as to the question of credibility, that the VTD splits at issue were designed to allow Morgan to extract "as much as possible" of two VTDs from District 93 for political purposes. 2nd Trial Tr. at 639-40, 675-79, 757-60. Morgan was thus not seeking to remove only specific portions of these VTDs based on their political makeup (or based on their racial makeup as a proxy for their political makeup), and, indeed, Morgan expressly testified that he was "not looking at racial-themed census blocks" in his mapping software when splitting them. 2nd Trial Tr. at 679-80. In short, the majority's view (as cited above) is based on the fact that political data are not available below the VTD level. However, one does not need to use race as a proxy for politics when splitting VTDs for political purposes if one's goal is to keep as much of a VTD as possible out of a District.

Consequently, I conclude that the majority's justifications for discrediting Morgan's testimony are unfounded. And, in my opinion, Morgan's explanations were highly credible, given his clear and articulate testimony as well as his prodigious knowledge and recollection of the redistricting process.

B. The Delegates Who Testified in Plaintiffs' Case

The majority opinion finds credible several of the delegates who testified on behalf of Plaintiffs (Delegates Jennifer McClellan, Delores McQuinn, Rosalyn Dance, Matthew James, and Algie Howell). Maj. Op. at 34, 38, 43, 48, 63, 75. The majority's finding of racial predominance heavily relies on these

witnesses' accounts. See, e.g., Maj. Op. 34-36, 38, 43-45, 48-49, 63, 65-66, 75, 81-82.

Throughout this opinion, I often refuse to accept these witnesses' testimony on grounds specific to each delegate or to a group of delegates. I write separately here, however, to raise a point that leads me to question the credibility of all of the aforementioned delegates.

Each of these delegates voted for the 2011 redistricting plan. 2nd Trial Tr. at 51, 65, 77, 85, 108, 110; 1st Trial Tr. at 63, 88. In so doing, they publicly approved of the plan. And, more importantly, they exercised the authority vested in them by their elected office to write HB 5005 into the law of the Commonwealth of Virginia and to subject its citizens to its terms.

The delegates here, however, have now all aligned themselves with challengers to HB 5005, who oppose the plan on the ground that it violates the Constitution of the United States. If the delegates actually believed that to be the case, the time to have acted was at the time of the vote, not now. The fact that these legislators have come lately into court in support of a challenge to the plan shows either that they were willing to vote for a plan that they believed to be unconstitutional when they voted for it or that they thought the plan was lawful at the time and are now seeking to have it set aside for other reasons. In either case, I cannot subscribe to the view that the testimony of such legislators is entitled to belief.

That conclusion is underscored by the fact that Spruill and Dance lauded HB 5001 (HB 5005's

predecessor) on the House of Delegates floor during the redistricting floor debates. See Pl. Ex. 33 at 42-46; Pl. Ex. 35 at 141-49, 157-59. Although there was not universal support for the bill, none of the delegates enumerated above spoke against it or expressed any concern about a constitutional infirmity. Thus, they either believed the plan to be lawful then or impermissibly kept their concerns to themselves. Either way, I cannot find credible their belated support for an attempt to set aside the plan for which they voted.

C. Expert Witness Dr. Jonathan Rodden

The majority opinion determines that expert Dr. Jonathan Rodden offered credible testimony. Maj. Op. at 18-19. I disagree.

First, Dr. Rodden was more an advocate for Plaintiffs than the disinterested expert that Plaintiffs would have us find. See, e.g., 2nd Trial Tr. at 330 ("I'd be happy to discuss further this VTD split if you'd like, but I gather you [Intervenors' counsel] don't want me to. But it would have been a very good illustration."); Pl. Ex. 69 at 4 ("In most of these cases, it is simply not possible to devise a credible post-hoc explanation for these decisions that is not based on race."); Pl. Ex. 69 at 54 ("At trial, Intervenors raised the possibility that this very oddly shaped corridor, which corresponds directly to race, was constructed as an incumbent protection maneuver. But it is difficult to see how this could possibly be the case."); Pl. Ex. 69 at 69 ("Th[e legislature's 55% BVAP and equal population goals] required a careful, region-wide strategy for the distribution of African Americans across districts, as well as a laser-sharp focus on race in the selection of

each VTD and census block."); Pl. Ex. 70 at 4 ("In situations where it is quite clear that the legislature's plan deviated from traditional redistricting criteria . . . and that these had obvious racial effects, the Defendant-Intervenors provided various non-racial post-hoc explanations for these deviations."); Pl. Ex. 70 at 8 n.1 ("Furthermore, there are often occasions in the courts where opposing expert witnesses will attempt to obfuscate even the most solid statistical facts with jargon and dubious alternative statistical specifications. This case is no exception. . . . The approaches taken by [Plaintiffs' experts], by contrast, are far more in keeping with standard statistical practice.").

Second, Dr. Rodden offered legal and factual conclusions beyond his expertise, including by speculating about the motivations of the legislature. See, e.g., 2nd Trial Tr. at 266 ("[T]his is a district that I think is fairly clear is designed to combine African-American populations in Chesapeake and Suffolk."); Pl. Ex. 69 at 15 ("In other words, Delegate Jones found it necessary to switch from a strategy in which Hopewell was awkwardly joined with Richmond, to one in which it was awkwardly joined with Petersburg and points West."); Pl. Ex. 69 at 20 ("Surely Mr. Loupassi would have known that these VTDs were troublesome for him at the time of the 2011 redistricting."); Pl. Ex. 69 at 54 ("[Delegate Joannou] was forced to give up four of his most Democratic precincts, and he could not have been pleased."); Pl. Ex. 69 at 61 ("The Legislature split the district as close to the dividing line as possible in order to keep African Americans in HD90, and whites out."); Pl. Ex. 70 at 4 ("In situations where it is quite clear that the legislature's plan deviated from traditional

redistricting criteria . . . and that these had obvious racial effects, the Defendant-Intervenors provided various non-racial post-hoc explanations for these deviations."). Although most of this testimony was not subject to objection, it was clearly beyond the scope of the area in which he was accepted as an expert. See 2nd Trial Tr. at 159 ("The witness will be accepted as an expert in the tendered area, geo-spacial [sic] data analysis and its application to redistricting. However, I think we [the Judges of this Court] are all of the view that we do not need the assistance of any expert in giving us the motivations and intent of anybody."). And, as the trier of fact, I do not have to, and do not, accept testimony of that sort because testimony beyond the scope of expertise does not help me "to understand the evidence or to determine a fact in issue." See Fed. R. Evid. 702.

Third, Dr. Rodden's theory of racial predominance was equivocal and inconsistent. In his report, Dr. Rodden suggested that his inquiry revealed that the legislature relied heavily on race in designing the Challenged Districts because of constraints imposed by the 55% BVAP target. See Pl. Ex. 69 at 2-5, 69-71; see, e.g., Pl. Ex. 69 at 3 ("I conclude that, within each region [the goals of achieving population equality and 55% BVAP] simply cannot be achieved without paying extremely careful attention to the race of each [VTD] and census block under consideration." (emphasis added)). At trial, however, Dr. Rodden vacillated, stating that the 55% BVAP target was only "the start point for my analysis." See 2nd Trial Tr. at 162. He also observed that "there are parts . . . of these regions where, in fact, the 55 percent target was very constraining, and it really was quite difficult to reach

the target, and there are others where it was somewhat less so" and that "in most instances, yes, there are other ways to get [to 55% BVAP], and my job was to describe how the VTDs and blocked [sic] were moved in order to get there." 2nd Trial Tr. at 162-63. He further claimed that "if, even in spite of going beyond the 55 percent target, there was still evidence of stark racial sorting that wasn't even required to reach the 55 percent target, I believe that only strengths [sic] the conclusion in my report that race predominated." 2nd Trial Tr. at 293-94; see also 2nd Trial Tr. at 352-53.

That same equivocation was reflected in Dr. Rodden's descriptions of specific Districts. For example, as to Districts 95 and 92, Dr. Rodden's report stated:

> The 2010 BVAP for both districts was 62%. Both were quite under-populated, though, especially District 95, which needed to add 12,000 people. District 92 needed to add almost 9,000. As can be seen in the maps above, as well as the zoomed-in maps below, any approach that was even remotely based on traditional redistricting principles would have ended up adding a very substantial number of whites. Given the large numbers of voters that needed to be added in order to achieve population equality, the addition of too many whites would have imperiled the 55 percent BVAP target.
>
> The solution was to redraw District 95 by making a narrow corridor through white neighborhoods in order to reach a corridor of African Americans between Highway 69 and Warwick Boulevard. As can be seen in Figure 15 above and Figure 16 below, African Americans

> and whites were separated with remarkable precision. As in the Hopewell area, the Legislature achieved its racial goals by dispensing with the principle of keeping VTDs together. The Legislature decided to split almost every single VTD along the Northern corridor of District 95. . . .
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> . . . .
>
> This new tentacle pulled in a substantial number of African Americans to District 95. This was important, because District 95 was then able to donate African Americans to District 92, which needed to add around 9,000 people without adding too many whites. . . .
>
> District 92, then, could avoid what would have been the obvious move had the districts been drawn according to traditional redistricting criteria.

Pl. Ex. 69 at 46, 48-49; see also Pl. Ex. 69 at 70 ("In a few cases, the achievement of the racial target in HB 5005 required rather dramatic alterations. For example, District 95 in Newport News reached out far to the North in order to draw in a narrow corridor of suburban African Americans and then donate African-American neighborhoods to District 92."). However, at trial, Dr. Rodden noted:

> [The 55% BVAP rule] constrained [Districts 92 and 95] to some extent, but certainly I think it almost goes without saying that when the final [BVAP] numbers are 60.7 and 60 percent, then there were many different ways to achieve the 55 percent target. And, in fact, these

> districts ended up with [BVAP] five percent higher than that.
>
> So it is certainly not the case that every one of these little squibbles we're looking at is somehow crucial to the achievement of the 55 percent target.

2nd Trial Tr. at 244. Furthermore, he agreed that "it would be possible to draw two majority minority districts [Districts 92 and 95] without going that far north" and that "there was no need to split any of [the VTDs in the northern portion of District 95] to maintain a 55 percent [BVAP] in that district." 2nd Trial Tr. at 340-41, 343.

In short, Dr. Rodden was unable to provide a consistent theory of racial predominance (or of the importance of the 55% BVAP target). His expert report differed markedly from his trial testimony, both with respect to his overall theory as well as to his descriptions of individual Districts. Such an expert is neither helpful to the trier of fact nor entitled to belief.

Finally, and relatedly, Dr. Rodden overstated the points for which he advocated and minimized or set aside contrary evidence. As exemplified above, Dr. Rodden exaggerated the extent to which Districts 92 and 95 were constrained by the 55% BVAP target in his report. He similarly did so with respect to District 63. Compare Pl. Ex. 69 at 35, 70, with 2nd Trial Tr. at 215-16. And, likewise, Dr. Rodden claimed that District boundaries generally divided white and African-American populations; but, a careful review of the maps at issue reveals that this was often not the case.

See Pl. Ex. 69 at 70-71; see, e.g., Pl. Ex. 69 at 18, 25, 28, 53, 56, 68. That calls his credibility into question.

For the foregoing reasons, I find that Dr. Rodden's testimony was so lacking in credibility that it does not support the heavy, indeed dispositive, weight afforded it by the majority.

D. The Statistical Experts

The majority determines that Plaintiffs' experts Dr. Maxwell Palmer and Dr. Stephen Ansolabehere were credible, whereas Intervenors' expert Dr. Jonathan Katz was not credible. Maj. Op. at 18-19, 19 n.14, 27-30. In my view, none of the statistical evidence offered by these experts is compelling, but the Court should generally rely on that provided by Dr. Katz.

Courts are not particularly well equipped to assess complex statistical analyses. Judges typically are not professional statisticians. And, as Dr. Rodden recognized, "there are often occasions in the courts where opposing expert witnesses will attempt to obfuscate even the most solid statistical facts with jargon and dubious alternative statistical specifications." Pl. Ex. 70 at 9 n.1. I agree with that proposition and, hence, when complex statistical evidence is in conflict such that nuanced changes in methodology alter the relevant conclusions, the evidence is of minimal utility.

Here, we have such a situation. As the majority opinion clearly demonstrates, different statistical experts have reached different results (as to the importance of race in the assignment of locations to the Challenged Districts) based on different statistical models and methodologies. Maj. Op. at 27-30. And,

each side's expert(s) considered alternative approaches to be inferior. Compare DI Ex. 16 at 19-21, and DI Ex. 101 at 6-12, with Pl. Ex. 51 at 4, and Pl. Ex. 71 at 20-24. Accordingly, it is hard to say which expert is "right." Indeed, the Court has struggled considerably with this issue. In its original opinion, it held, as to the issue of whether race or politics served as a better predictor of "the likelihood of inclusion of VTDs in one of the Challenged Districts," that Dr. Ansolabehere's approach was unreliable and that Dr. Katz's was more reliable. Bethune-Hill, 141 F. Supp. 3d at 551, 551 n.29.

Moreover, statistical evidence is also only of modest usefulness because, as Dr. Katz observed, statistical models "are a [sic] best crude approximations about how legal, demographic, political, and geographical constraints affect the inclusion (or exclusion) of a VTD into a particular legislative district." DI Ex. 101 at 10. The Court recognized this in its previous opinion:

> More fundamentally, however, Dr. Ansolabehere's "race versus politics" opinions miss the mark because they do not consider the extent to which the boundaries themselves are justifiable by neutral criteria or any other motivation besides race or political disposition. The models that he employed do not, for example, consider "economic factors, social factors, cultural factors, geographic factors, governmental jurisdictions and service delivery areas."

See Bethune-Hill, 141 F. Supp. 3d at 551 (citations omitted). Thus, while statistical evidence may offer guidance as to whether race predominated, it has

severe limitations when measured against direct testimony by those involved in the redistricting process about why specific District lines were drawn. And, here, we have such direct testimony (e.g., by Jones and Morgan).[9]

Notwithstanding my reservations respecting the statistical evidence in this case, it is my opinion that, among the statistical experts, Dr. Katz's findings were the most reliable. This is because the Court previously found that Dr. Katz's methodology was comparably reliable, that finding was not appealed, and, in any case, the Supreme Court found no error in the Court's credibility assessments. It is therefore not appropriate to revisit that finding. See Doe v. Chao, 511 F.3d 461, 465 (4th Cir. 2007) ("The mandate rule likewise restricts the district court's authority on remand from the court of appeals. First, 'any issue conclusively decided by this court on the first appeal is not remanded,' and second, 'any issue that could have been but was not raised on appeal is waived and thus not remanded.'" (citations omitted)).[10]

My view as to Dr. Katz is underscored by the fact that he offered reasonable responses to Dr. Palmer's critiques of his analysis (and gave good cause to

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[9] Statistical evidence is, of course, plainly relevant. See Bethune-Hill, 137 S. Ct. at 800. The point, however, is that such evidence is flawed, and those flaws should be considered as part of a holistic analysis, especially where direct evidence is available.

[10] Dr. Ansolabehere did not testify at the second trial. I find, therefore, that the Court's previous findings circumscribe any relevance of his testimony. See Bethune-Hill, 141 F. Supp. 3d at 551-52.

question reliance on Dr. Palmer's approach and conclusions). As the majority observes in concluding that Dr. Katz's methodology was unreliable, Dr. Palmer claimed: (1) that Dr. Katz failed to weight each VTD by total population; and (2) that Dr. Katz's method of accounting for the distance between VTDs and the Challenged Districts "was flawed because it considered the distance from each VTD to all 12 challenged districts." Maj. Op. at 28-29. As to weighting, however, Dr. Katz clarified that weighting is normally required to make a sample representative of the whole; but, here, "we have the entire population of VTDs . . . . so [the] sample is perfectly representative." 2nd Trial Tr. at 789-90. And, he noted that "there actually are lots of weighting schemes one might use" but "only the weighting scheme that weights by . . . total population, in fact, leads to the finding that Dr. Palmer has." 2nd Trial Tr. at 790 (emphasis added). As to distance measurement, moreover, Dr. Katz explained that, unlike his methodology, "Dr. Palmer's approach completely neglects the possibility that a VTD near more than one challenged district may not be included in one, but could reasonably be incorporated into its second-closest neighbor" and that "in all models except for Dr. Palmer's chosen specification, the average Democratic vote share remains a significant predictor of a VTD's inclusion in a challenged district." DI Ex. 101 at 9-10.[11]

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[11] The majority also determines that Dr. Katz was unreliable because he observed that census blocks contain political information insofar as race is correlated with politics. Maj. Op. at 30 n.24. This assessment is erroneous for several reasons.

In sum, the statistical evidence in this case is of limited persuasive value. However, I believe that the Court's previous credibility findings as to Dr. Katz and Dr. Ansolabehere should not be disturbed and that, among the statistical experts, Dr. Katz's conclusions were the most reliable. And, for the reasons explained above, I do not find Dr. Palmer's analysis or his critiques of Dr. Katz's approach to be credible.[12]

First, although "using race as a proxy for political party affiliation constitutes the use of race, not party" under the relevant legal standards, see Maj. Op. at 30 n.24, the fact that Dr. Katz found a statistical correlation between race and party did not render his analysis any less valid or believable. Indeed, that correlation is quite well established. See Cooper v. Harris, 137 S. Ct. 1455, 1473 (2017) ("And crucially, political and racial reasons are capable of yielding similar oddities in a district's boundaries. That is because, of course, 'racial identification is highly correlated with political affiliation.'" (citations omitted)).

Second, the purpose of Dr. Katz's acknowledgment of this correlation was not to question the applicable legal doctrine but rather to, inter alia, undermine Dr. Palmer's statistical methodology. Dr. Katz explained that "Dr. Palmer's analysis of the inclusion of particular Census blocks in the Contested districts based on its racial composition shares the same statistical flaws of Dr. Ansolabehere's analysis at the VTD level." DI Ex. 101 at 2 (emphasis added). One of those flaws was that Dr. Ansolabehere did not correctly control for the relationship between race and politics. DI Ex. 16 at 20. Dr. Katz's point seems to have been that Dr. Palmer's model suffered from a similar deficiency because he adopted the "absolutely incorrect" "foundational assumption that Census blocks do not contain political information." See DI Ex. 101 at 11-12.

[12] The majority believes that the Court's previous factual findings, many of which are cited in this dissenting opinion, should be "open to reconsideration" "[g]iven that these prior findings were reached

II. Population Equalization

Before addressing the evidence, there is one overarching point worth noting. The majority, relying on Alabama Legislative Black Caucus v. Alabama, holds that "the need for population equalization does not explain why the legislature selected certain boundary lines over others." Maj. Op. at 77. It thus refuses to consider Intervenors' argument that "VTDs were split at the end of the redistricting process for the purpose of equalizing population." Maj. Op. at 77. The

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while applying an erroneous legal standard, and in light of the voluminous new evidence presented by both parties on remand." Maj. Op. at 18 n.13. But, factual findings as to the credibility of witnesses are not in any way dependent upon the relevant substantive legal standard, and nothing in the record of either trial suggests to me that these findings were incorrect. And, the remaining factual findings discussed herein are equally not dependent on the relevant legal standard (e.g., findings about the legislature's actual motivations for drawing specific District lines) and/or are wholly supported by the record as I interpret it.

The majority also concludes that "because this Court unanimously agreed to allow the presentation of new evidence, the Court also reopened the question of the credibility of the witnesses who testified at the second trial." Maj. Op. at 18 n.13. However, although the Court did reopen the record, it never rendered a decision as to what findings were actually open to reconsideration. See Dkt. No. 160 at 1-2. I do not believe that the solicitation of additional testimony on remand, standing alone, allows us to wholly jettison the Court's previous credibility assessments, especially as to those assessments that were neither appealed nor arguably affected by the Supreme Court's decision (such as the findings respecting Katz). See Doe, 511 F.3d at 465, 467. In any case, as I explain above, nothing in the record of either trial convinces me that the Court's earlier credibility determinations were erroneous and should be reconsidered.

rejection of that argument, however, I respectfully submit, is misguided.

In Alabama, the Supreme Court concluded:

> In our view, however, the District Court did not properly calculate "predominance." In particular, it judged race to lack "predominance" in part because it placed in the balance, among other nonracial factors, legislative efforts to create districts of approximately equal population.
>
> In our view, however, an equal population goal is not one factor among others to be weighed against the use of race to determine whether race "predominates." Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to how equal population objectives will be met.
>
> . . . .
>
> . . . . In other words, if the legislature must place 1,000 or so additional voters in a particular district in order to achieve an equal population goal, the "predominance" question concerns which voters the legislature decides to choose, and specifically whether the legislature predominately uses race as opposed to other, "traditional" factors when doing so.

Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1270-71 (2015) (citations omitted). In short, the Supreme Court ruled that population equality is not to

be weighed against race in assessing whether race served as the legislature's predominant consideration.

That holding does not, however, support the proposition that the need to equalize population can offer no insights into the motivations of the legislature. Where, for example, a map drawer explains that the only goal in splitting a particular VTD was to equalize population between Districts (such that no other factors were considered), a court may take that statement into account without "weighing" population equality against race. That is because the map drawer is merely asserting, in an alternative manner, that race played no role in the decision. Surely, a court is entitled to consider a map drawer's outright denial that he relied on race in designing a particular portion of a District's lines because that would go directly to the issue of "which voters the legislature decides to choose" to place in a particular District. See Alabama, 135 S. Ct. at 1271. I see no difference between such a denial and a comprehensive listing of every factor that the map drawer did rely upon.

That point is of great significance here. Morgan testified that he split the VTDs in the Challenged Districts "in most circumstances"; that he typically did so without Jones' input; that he did not use race or apply a racial thematic to his mapping software when splitting VTDs; and that most VTD splits were made for population equality reasons. 2nd Trial Tr. at 629-30, 668, 714-15, 731-32. Thus, the Court can consider Morgan's testimony that he sought to equalize population in splitting most VTDs without running afoul of Alabama.

III. Statewide Evidence

The majority maintains that "the overall racial disparities in population movement, and the splits of VTDs and geographies along racial lines" as well as "Dr. Palmer's conclusion that race predominated over party in predicting the likelihood that a VTD would be assigned to a challenged district" constitute strong statewide evidence of racial predominance. Maj. Op. at 36. In my opinion, however, the statewide evidence on which the majority's conclusion is based is not compelling.

First, I do not view the statistical evidence as particularly helpful. Second, I adopt Dr. Katz's determination that race and party "were a statistical tie" in terms of their ability to predict which VTDs were placed within the Challenged Districts. See 2nd Trial Tr. at 823-24; see also DI Ex. 16 at 20-21. Third, I deem Dr. Palmer's statistical analysis of the extent to which BVAP predicts a census block's inclusion in a Challenged District to be of little value, given the methodological flaws explained by Dr. Katz (i.e., Dr. Palmer's failure to control appropriately for: (1) the requirement that Districts be contiguous; and (2) the correlation between race and politics). See DI Ex. 101 at 2, 11-12; see also DI Ex. 16 at 19-21. Fourth, I consider Dr. Rodden's opinions as to racial predominance to be neither reliable nor helpful. Fifth, I find credible Morgan's testimony that he did not rely on race in splitting VTDs and that he was the person who generally split VTDs. See 2nd Trial Tr. at 668, 714-15. And, sixth, I generally view as credible Morgan and Jones' testimony respecting the reasons for the District lines.

In sum, the statewide evidence of racial predominance, as cited by the majority, is not especially persuasive, and it offers no real support for a finding that race predominated in the drawing of the eleven Challenged Districts.[13]

IV. District-by-District Analysis

I disagree with the majority's assessment of the District-specific evidence. For the reasons set forth below, I conclude that Plaintiffs have not proved, by a preponderance of the evidence, that race predominated in any of the Challenged Districts.[14]

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[13] Additionally, I note that the majority largely sidesteps the findings of Intervenors' expert Dr. Thomas Hofeller. Maj. Op. at 32 n.25. However, he offered credible statewide evidence that race did not predominate over traditional redistricting principles. He found, for example, that: the 2011 "map and the individual majority minority districts contained therein are at least as compact and contiguous as the 1991 and 2001 maps and individual majority minority districts which were approved under the Virginia constitutional standards in Jamerson and Wilkins"; "[t]here was a high degree of protection extended to incumbents [in the 2011 map], particular [sic] in the case of minority incumbents and Republican incumbents"; and "[t]here were no negative contiguity issues in HB 5005." DI Ex. 14 at 24. Dr. Hofeller is a profoundly knowledgeable redistricting expert, with more background and experience in the field than any other expert in this case, and I respectfully submit that summarily discounting his testimony is misguided. See DI Ex. 14 at 2-5. I therefore consider his statewide findings and conclude that they are yet another reason that the statewide evidence cited by the majority does not support a finding of racial predominance.

[14] Two preliminary points are worth mentioning here. First, both this opinion and the majority's at times make inferences as to legislative motive from circumstantial evidence. That is certainly

A. The Richmond Region

i. District 71

1. BVAP & Racial Intent

The majority initially supports its finding of racial predominance by observing that District 71 faced low BVAP (46.3%) and population numbers and,

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permissible. Bethune-Hill, 137 S. Ct. at 797-99. However, where multiple inferences as to predominant legislative motive are equally plausible, I do not believe that racial predominance has been established by a preponderance of the evidence.

Second, it is helpful to consider the following District-specific evidence in perspective of the fact that Virginia underwent major population shifts in the decade before the 2011 redistricting. As Dr. Hofeller explained, "Virginia had experienced significant population growth over the previous decade which caused significant overpopulation of individual districts in Northern Virginia and underpopulation on the southeastern portion of the state including the Richmond and Tidewater areas." Pl. Ex. 102 at 3. The underpopulated regions included the Challenged Districts. See Pl. Ex. 102 at 3.

These population shifts greatly affected the 2011 redistricting process and, according to Jones, "rippled through the whole plan." 2nd Trial Tr. at 476-78. Indeed, in the final map, three entire Districts were moved "from Hampton Roads, south side and southwest" to the Northern Virginia area. See 2nd Trial Tr. at 476.

I mention these demographic trends not to suggest that population equality pressures were the predominant motivation of the legislature. Indeed, it is legally impossible for that to be the case. Alabama, 135 S. Ct. at 1270. Rather, I highlight these trends to show the contextual backdrop against which the 2011 redistricting process occurred. These trends teach that the 2011 plan was not one in which it was possible for the Districts to remain unchanged.

accordingly, Jones conceded that the 55% BVAP rule affected the way that the District was drawn. Maj. Op. at 39. Although it is true that Jones agreed that "part of the reason that [District 71] moved to the east [rather than to the west] was to increase [BVAP]" and that the 55% BVAP rule affected the District lines, those statements have only limited bearing on the predominance inquiry. See 2nd Trial Tr. at 532-33. It is undisputed that race was considered, and it is established that a 55% BVAP rule was employed. Maj. Op. at 17-18; 2nd Trial Tr. at 521. The relevant question, however, is not whether race was considered. It had to be considered under the Supremacy Clause. The issue is whether race was "the legislature's predominant motive for the design of the district as a whole." Bethune-Hill, 137 S. Ct. at 800.

To that point, the majority, I think, neglects to consider the legislature's other constraints and motivations in constructing District 71. And, the record reflects that there were many. For example, Jones wanted District 71 to become more Richmond-centric, which restricted District 71's ability to expand north, northwest, northeast, or east. See 2nd Trial Tr. at 530-31; 1st Trial Tr. at 305; DI Ex. 94 at 4. Furthermore, Jones believed that moving District 71 west would "have presented a political problem for republican members of the legislature." 2nd Trial Tr. at 482, 491. Similarly, Jones testified that Delegate Manoli Loupassi of District 68, which was west of District 71: "was concerned about getting too much of Chesterfield. And he wanted more voters in the Richmond city area which would have been more favorable to him." 1st Trial Tr. at 306-07; DI Ex. 94 at 4. Moreover, Jones wished to avoid pairing incumbents, which constrained

District 71's movement to the west and southeast. See 1st Trial Tr. at 304; see also 2nd Trial Tr. at 482, 699. That objective limited District 71's ability to move west because "if [District 71] would have went west too far, it would have combined Delegate Loupassi [sic] either Delegate [Betsy] Carr or Delegate McClellan." 2nd Trial Tr. at 491; DI Ex. 94 at 4. And, it limited District 71's expansion to the southeast because Delegate McQuinn of District 70 resided near the southeastern edge of District 71. See 1st Trial Tr. at 311; DI Ex. 94 at 4; see also 2nd Trial Tr. at 482. Finally, McClellan indicated that the James River served as a traditional natural boundary of District 71 to the south. 1st Trial Tr. at 45. A holistic analysis shows that the drawing of District 71 was determined and limited by a host of factors.

2. Generalized Population Data

The majority next points to overall population movements in District 71. Maj. Op. at 39. Specifically, it notes that "more than 11,000 people with a 21.3% BVAP were moved out of District 71, and more than 17,000 people with a noticeably higher 72.1% BVAP were moved into District 71." Maj. Op. at 39. And, it contends that "areas moved out of District 71 into non-challenged districts had an extremely low 6.6% BVAP." Maj. Op. at 39.

However, these population shifts offer few insights into racial predominance here. First, as the Court previously concluded (and as discussed in greater detail in the analysis of District 70), mere numerical population shifts are not concerning. See Bethune-Hill, 141 F. Supp. 3d at 561-62. Second, as set forth below, race-neutral factors largely explain District 71's lines.

At best, the majority's data suggest that race played some role. But, that is undisputed.

3. Specific Line-Drawing Decisions

The majority then emphasizes specific line-drawing decisions as evidence of racial predominance: (1) the transfer VTDs 701, 702, and part of 703 from District 70 to District 71 and the shift of VTD 604 from District 74 to District 71; (2) the transfer of VTDs Summit Court, Hilliard, and Stratford Hall from District 71 to District 72 and the move of Ratcliffe from District 74 to District 71; (3) the movement of VTD 207 from District 71 to District 68; and (4) the split of VTD 505 between Districts 71 and 69. Maj. Op. at 39-42.

a. Decision 1: VTDs 701, 702, 703 & 604

As to the first cited decision, the majority argues that VTDs 701, 702, 703, and 604 were heavily populated and had substantial BVAP. Maj. Op. at 39. And, it claims that McQuinn objected to the transfer of VTDs 701, 702, and 703, resided nearby, and had long represented those areas; nevertheless, she resigned herself to the fact that she would have to lose those VTDs to support District 71's BVAP, and the changes were made over her objection. Maj. Op. at 39-40. Finally, the majority repeats its assertion that Jones conceded that the District's eastward shift was impacted by the 55% BVAP target. Maj. Op. at 40.

As an initial matter, the fact that these VTDs had substantial population and BVAP says little about racial predominance. Those VTDs would have needed to be included in some District. And, as discussed

below, their movement served both neutral and racial goals.

With respect to VTDs 701, 702, and 703, the majority correctly notes McQuinn's testimony. See 2nd Trial Tr. at 103-04. However, her personal concerns and beliefs as to these VTDs had little relevance to the redistricting process. According to Jones' testimony at the first trial, he "sat down with" McQuinn and believed that "she was 95, 98 percent pleased with what the final product was" as to her District. 1st Trial Tr. at 312. And, McQuinn averred that she never "express[ed] [her] concern about losing 701 and 702 to Delegate Jones." 2nd Trial Tr. at 103.[15]

McQuinn did speak with McClellan about her concerns. 2nd Trial Tr. at 43, 103-04. And, McClellan's role in the redistricting process was to "coordinate[] requests to Delegate Jones for changes to the map in -- as introduced from the Richmond area democratic delegates." 2nd Trial Tr. at 27. However, it does not appear that McClellan shared McQuinn's feelings with Jones. See 2nd Trial Tr. at 44, 61.[16]

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[15] McQuinn's testimony conflicted with that of Jones on several points, such as the extent of her input and interactions with Jones. Compare 2nd Trial Tr. at 100-03, with 1st Trial Tr. at 312, 398. McQuinn did not testify at the first trial, and I refuse to credit her conflicting testimony for the same reasons I refuse to credit that of James and Howell.

[16] McClellan similarly asserted that she opposed the transfer of part of VTD 703 into her District. 2nd Trial Tr. at 950. But, I can find no evidence that she voiced that concern to Jones.

Accordingly, Jones did not make these transfers over McQuinn's objections or in contravention of his understanding of that area's communities of interest. Rather, from his perspective (informed by meeting with McQuinn), VTDs 701 and 702 (as well as the District 71 portion of VTD 703, assuming for the moment that he was involved in splitting that VTD) were some of the few VTDs unencumbered by other constraints and that could be moved freely without compromising the legislature's varied goals for District 71.

Now, it is true that both Jones and Morgan acknowledged that VTDs 701 and 702 were moved from District 70 to District 71 to increase District 71's BVAP. 2nd Trial Tr. at 538, 737. However, the record clearly shows that this goal was not pursued single-mindedly and that there were other important race-neutral objectives involved in designing that region. For example, one of Jones' goals was to make District 71 more Richmond-centric. 2nd Trial Tr. at 530-31. Although there were several largely African-American VTDs in nearby Henrico County, the legislature instead selected VTDs 701, 702, and part of 703 to include in District 71, which better aligned District 71 with the Richmond border. See Pl. Ex. 69 at 18; DI Ex. 92 at 9; DI Ex. 94 at 4.

Similarly, the legislature wished to avoid pairing incumbents. See 1st Trial Tr. at 304. Although VTDs 703 and 705 were predominantly African-American, only VTDs 701 and 702 were incorporated fully into District 71 because including all of 703 and 705 would have paired McQuinn with McClellan. See 1st Trial Tr. at 311; DI Ex. 92 at 9; DI Ex. 94 at 4. Thus, although race may have influenced the legislature's selection of

VTDs 701 and 702, it was hardly the only or the most important factor.[17]

As to VTD 703, Morgan testified that he split that VTD and that he did so for population equality purposes. 2nd Trial Tr. at 733. Morgan did not rely on race data when he split VTDs, so this split should be deemed race neutral. See 2nd Trial Tr. at 668, 714-15. And, McClellan acknowledged that VTD 703 was split along "[a] major street" that served as "a natural boundary between communities of interest." 2nd Trial Tr. at 56, 951. That is consistent with how Morgan often split VTDs, and it shows that factors other than race were involved. See 2nd Trial Tr. at 628, 705-06, 736, 745.

I acknowledge that McClellan countered Morgan's testimony, representing that she was involved in the VTD 703 split and that VTD 703 "needed to be split" to satisfy the 55% BVAP and population equality targets. 2nd Trial Tr. at 950-51. But, her assertion is demonstrably false. The legislature could have allocated the entirety of VTD 703 to District 70 while satisfying all of District 71's myriad constraints (including the 55% BVAP and population equality requirements) simply by splitting VTD 301 (which was in Richmond) between Districts 71 and 74. See Pl.

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[17] As set forth below, I conclude that the split of VTD 703 was race neutral. However, even if race were involved, the foregoing analysis of VTDs 701 and 702 would apply with equal weight to VTD 703.

Ex. 71 at 56, 65; DI Ex. 38 at 7; DI Ex. 94 at 4; see also Pl. Ex. 63 at 127-28.[18]

In light of this analysis, I cannot conclude that the split of VTD 703 is probative of racial predominance. Morgan indicated that he split VTD 703 on a non-racial basis. And, given that the split was not required to comply with the 55% BVAP target, I simply cannot credit McClellan's testimony, and her testimony is critical to a finding that the split was racially motivated. Furthermore, the split does not appear racial; it simply divided two largely African-American populations. Pl. Ex. 69 at 18. Moreover, even if race were considered in the split of VTD 703, the fact that the split was not necessary to achieve 55% BVAP teaches that race was a limited consideration. The split of VTD 703 was merely a sufficient condition for meeting 55% BVAP rather than a necessary one, and therefore some factor other than race controlled which sufficient option was elected.[19] Thus, I do not believe

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[18] For example, if 175 BVAP were added by way of splitting VTD 301, District 71's BVAP would have cleared 55% and its population would have met the population minimum (the range was 79,210-80,810). See Pl. Ex. 71 at 56, 65; DI Ex. 38 at 2, 7; see also Pl. Ex. 63 at 127-28; Maj. Op. at 3-4.

That movement also would not have risked District 74's BVAP and population targets. Reducing District 74's BVAP by 175 would have yielded a population of 79,419 and BVAP of 57.1%. See Pl. Ex. 71 at 65; DI Ex. 38 at 8; see also Pl. Ex. 63 at 127-28.

[19] I recognize that a legislature could draw Districts in a racial manner even if it were not "necessary" to comply with a BVAP requirement. I do not find that to be the case here, where the legislature is accused of using a numerical target inappropriately in attempting to comply with the Voting Rights Act. See Maj. Op.

that race had anything to do with the split of VTD 703. And, to the extent that it did, it served as a minimal factor.[20]

As to VTD 604, the record does not, I think, permit a finding that its addition to District 71 was primarily racial. The majority seems to base its contrary view only on the fact that VTD 604 had high BVAP. Maj. Op. at 39. But, incorporating VTD 604 patently aligned District 71 with the Richmond border and made the District more Richmond-centric, in line with one of Jones' goals. See DI Ex. 94 at 4; 2nd Trial Tr. at 530-31. And, it made District 71 more compact on its face. See DI Ex. 94 at 4. Hence, I cannot find that race predominated with respect to this VTD.[21]

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at 1. Accordingly, if a specific change was not mandated by the 55% BVAP rule, it suggests to me that the BVAP target was of limited, i.e., not predominant, importance vis-à-vis race-neutral factors.

[20] When asked on cross-examination whether VTDs 701, 702, and 703 were moved to increase District 71's BVAP, Jones responded: "Yes and no. Yes, but also for additional population that was needed for the district." 2nd Trial Tr. at 538. Given that Jones was asked a yes or no question about three separate VTDs, that Morgan testified that he split VTD 703 for population equalization purposes, and that Jones attested that part of the reason for the transfers was population equality, Jones' statement was consistent with VTD 703 having been split by Morgan to equalize population and does not alter my conclusion about VTD 703.

[21] McClellan did agree, without explanation, that she had testified during her deposition that "uniting 603 and 604 made sense because of similar demographics." 2nd Trial Tr. at 56. I do not know what she meant by that statement, so I give it no weight.

In sum, as to VTDs 701, 702, 703, and 604, it is clear that, although race played some role, other significant factors impacted the drawing of the District lines. It is far from apparent that race was primary.

b. Decision 2: VTDs Summit Court, Hilliard, Stratford Hall & Ratcliffe

The second decision cited by the majority involves the addition of the predominantly African-American Ratcliffe VTD to District 71 and the removal of the largely white Summit Court, Hilliard, and Stratford Hall VTDs. Maj. Op. at 40. The majority argues that this decision evinces racial predominance because Jones removed VTDs in Henrico County that were predominantly white in order to make District 71 Richmond-centric but then added a VTD in Henrico County that was predominantly African-American. Maj. Op. at 40.

The majority's analysis, however, misses the mark because it evaluates that decision in a vacuum without considering the varied objectives and constraints of the legislature. When these are taken into account, it is clear that race was but one of several factors influencing the decision at issue.

As an initial matter, as suggested by the majority opinion, the removal of Summit Court, Hilliard, and Stratford Hall served numerous race-neutral goals. As both Jones and Morgan testified, the transfer was intended to make District 71 more Richmond-centric; and, it did so by eliminating from District 71 three VTDs in Henrico County. 2nd Trial Tr. at 490, 530-31, 697; 1st Trial Tr. at 305; see also DI Ex. 94 at 4.

Furthermore, both Jones and Morgan averred that moving those VTDs into District 72 was necessary to support the needs of that District. 2nd Trial Tr. at 489-90, 697.[22]

It is true that adding Ratcliffe to District 71 incorporated a new Henrico County VTD, thereby somewhat undercutting the goal of Richmond-centrism. See DI Ex. 94 at 4. And, Morgan testified that Ratcliffe was added because it "did have African-American voting strength." 2nd Trial Tr. at 698. Nevertheless, as Jones and Morgan explained, District 71 did become more Richmond-centric; three Henrico VTDs were moved out and one Henrico VTD was moved in. See 2nd Trial Tr. at 531-32, 697, 734; DI Ex. 94 at 4. And, myriad factors influenced the addition of Ratcliffe, such as incumbent pairing constraints in the southeast, political, legislator preference, and incumbent pairing constraints in the west, geographic constraints in the south, constraints set by the goal of Richmond-centrism in the north, northwest, northeast, and east, and constraints imposed by the needs of District 72 in the

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[22] Jones and Morgan's testimony was ambiguous on this score. Jones stated the VTDs were moved to District 72 because population was rotated from District 73 to District 72, "and that population was needed for 72." 2nd Trial Tr. at 489-90. Morgan contended that those VTDs allowed Canterbury, a Republican VTD, to be added to District 72, but that was not strictly correct based on the VTD geography. 2nd Trial Tr. at 697; DI Ex. 91 at 144. As shown in the analysis of District 74, however, Jones and Morgan wanted to include Canterbury in District 72 while also promoting its compactness. To accomplish both goals required the transfer of the District 71 VTDs. See DI Ex. 91 at 144. That is what I take Jones and Morgan's statements to have meant.

north. See 2nd Trial Tr. at 482, 489-91, 530-32, 697-99; 1st Trial Tr. at 45, 305-07, 311; DI Ex. 94 at 4.

Indeed, all that the second cited decision really teaches is that it is possible for a legislature to balance and realize a variety of goals. By acting as it did, the legislature largely achieved its objectives of: (1) avoiding the pairing of incumbents; (2) supporting legislator preferences and political goals; (3) rendering District 71 Richmond-centric; (4) meeting District 72's needs; and (5) maintaining 55% BVAP. On this record, I do not think that it can be found, by a preponderance of the evidence, that race was the predominant reason.

c. Decision 3: VTD 207

As to the third cited decision, the removal of VTD 207, the majority primarily highlights the testimony of McClellan. It claims that McClellan opposed losing VTD 207 and splitting the Fan Neighborhood. Maj. Op. at 41. And, it notes that McClellan testified that, when she approached Jones with her concerns, he said that he would be open to changes so long as they complied with the 55% BVAP and population equality targets. Maj. Op. at 41. Further, it observes that McClellan tried to draw maps that included VTD 207 in District 71 but that she could not do so without reducing her BVAP below 55%. Maj. Op. at 41-42. Finally, it maintains that VTD 207 had been in District 71 for at least 20 years, that it was heavily Democratic and supportive of McClellan, that it had low BVAP, that transferring it split the Fan neighborhood, and that it was shifted to District 68, which was more suburban and represented by a Republican delegate, Loupassi. Maj. Op. at 40-41.

The Court, however, previously addressed the precise issues raised by the majority. It found:

> And here, [McClellan's] personal preferences [as to VTD 207] appeared in conflict with those of another legislator: Delegate Loupassi. According to Delegate Jones, Delegate Loupassi used to be on the Richmond City Council and his former ward abutted precinct 207 where he had strong support, so he "wanted that precinct in his district." Delegate McClellan argued that adding precinct 207 to Delegate Loupassi's district "didn't help him" because he is a Republican, but Delegate Jones testified that Delegate Loupassi has "a broad base of support from the democratic side of the aisle" and had a personal "community of interest"—rather than partisan—connection to the area.

Bethune-Hill, 141 F. Supp. 3d at 563 (citations omitted). Nothing at the second trial, in my view, rendered that finding invalid.

In addition to the evidence on which that finding was based, Jones attested that Loupassi "was concerned about getting too much of Chesterfield" and "wanted more voters in the Richmond city area which would have been more favorable to him." 1st Trial Tr. at 307. And, he explained that Loupassi's desires prevailed because "he is a Republican member of the majority party." See 1st Trial Tr. at 305. Thus, as Jones testified, the shift of VTD 207 was not "driven principally by race" but by "politics and personal preference." 1st Trial Tr. at 307-08.

Morgan corroborated Jones' testimony (albeit with less detail). He stated that VTD 207 was moved because "unlike the previous Republican delegate, Delegate Marrs, who was from Chesterfield, Delegate Loupassi is from Richmond." 2nd Trial Tr. at 702-03.[23]

Additionally, it is hard to imagine that the transfer of VTD 207 was animated predominantly by race, given that it was replaced by VTD 204, which had a similar demographic composition to VTD 207. See 2nd Trial Tr. at 531. VTD 207 had a population of 3,182, a voting age population ("VAP") of 2,946, and a BVAP of 93, whereas VTD 204 had a population of 2,980, a VAP of 2,818, and a BVAP of 358. Pl. Ex. 63 at 127-28. Hence, the switch did not aid District 71 substantially in achieving 55% BVAP. And, although there is little evidence as to why VTD 204 was added, the Court previously has held that the change made District 71 more compact. Bethune-Hill, 141 F. Supp. 3d at 563.

In a footnote, the majority reaches the opposite conclusion, suggesting that the swap of VTD 207 for 204 was racially motivated because the transfer of equivalent numbers of people was not necessary for population equalization and, "[w]ithout this swap, the BVAP of District 71 would have dipped below 55%." Maj. Op. at 42 n.32. But, as set forth above, there were plainly race-neutral reasons for transferring out VTD

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[23] The majority refuses to credit Jones because he "could not 'recall directly' at the second trial any specific conversation with Loupassi" and because Intervenors did not call Loupassi. Maj. Op. at 41 n.31 (citations omitted). However, memories fade. And, the burden of proof here is on Plaintiffs, so I do not fault Intervenors for failing to call Loupassi (especially given Morgan's confirming testimony).

207 (and therefore for moving in a similar number of people). And, although switching VTDs 207 and 204 was sufficient to allow District 71 to maintain 55% BVAP, it was in no way necessary to realizing that goal. Without the swap, District 71's BVAP would only have fallen to 54.8%. See Pl. Ex. 71 at 17-18. That BVAP differential could have been addressed by adding a miniscule amount of BVAP and/or ceding of a tiny amount of non-BVAP, which could have been accomplished in any number of ways. See Pl. Ex. 63 at 127-28; Pl. Ex. 71 at 65; DI Ex. 38 at 7.[24] Accordingly, because the swap was not mandated by the 55% BVAP rule (i.e., it was sufficient and not necessary) and because there were race-neutral justifications for the change, I cannot subscribe to the view that VTD 204 replaced VTD 207 primarily for racial reasons.

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[24] If VTD 207 were retained and 204 excluded, District 71 would have had a population of 80,524 and a BVAP of 54.8%. See Pl. Ex. 63 at 127-28; Pl. Ex. 71 at 65; DI Ex. 38 at 7. However, if just 250 BVAP were added by, for example, splitting VTD 301 with District 74, 55% BVAP and population equality would have been preserved. See Pl. Ex. 71 at 65; DI Ex. 38 at 7; see also Pl. Ex. 63 at 127-28.

That change would not have imperiled District 74's target numbers, either. Reducing District 74's BVAP by 250 would have left District 74 with a population of 79,344 and a BVAP of 57.1%. See Pl. Ex. 71 at 65; DI Ex. 38 at 8; see also Pl. Ex. 63 at 127-28.

District 71 could also have remained at 55% BVAP and within population by ceding 200 non-BVAP. See Pl. Ex. 71 at 65; DI Ex. 38 at 7; see also Pl. Ex. 63 at 127-28. That could have been accomplished by either splitting a VTD or altering the split of VTD 505. The latter option would have reduced District 69's BVAP to 55% and increased its population to 79,586. See Pl. Ex. 71 at 56, 65; DI Ex. 38 at 7.

Relatedly, given that VTD 207 could easily have been drawn into District 71 while maintaining 55% BVAP, I find McClellan's assertion that she was unable to do so to be quite dubious. See 1st Trial Tr. at 40 ("Every possible way, and I literally, even if it meant splitting it, went street by street to see how much of that precinct I could keep, and based on the other parts of the district, any portion of 207 would push the [BVAP] below 55 percent when I moved it on the map."). Moreover, as suggested throughout the analysis of District 71, this type of inaccuracy pervaded McClellan's testimony. Because the extent to which the 55% BVAP rule dictated the contours of the District lines is a critical issue here, these inaccuracies also render her testimony as a whole highly suspect. I thus do not credit McClellan at all as to VTD 207.

In short, as to the removal of VTD 207, there is evidence in the record that race was involved. However, that evidence is largely incredible, and there is substantial reliable evidence that the primary considerations were politics and legislator preferences. And, moving VTD 207 to District 68 was not necessary to ensure 55% BVAP in District 71, which is further proof that race-neutral factors played a more important role than race. Hence, I do not view the decision as strong evidence of racial predominance.

d. Decision 4: VTD 505

As to the fourth cited decision, the split of VTD 505, the majority again highlights the testimony of McClellan (and cites some circumstantial evidence supporting her testimony). Maj. Op. at 42. It indicates that McClellan and Carr were unable to keep VTD 505 whole while maintaining 55% BVAP in Districts 69 and

71, so they agreed to split VTD 505 between these Districts. See Maj. Op. at 42.

As an initial matter, Morgan provided a different explanation. He attested that he drew the VTD 505 line as he did because "Delegate Jones and [he] received input from the registrar of Richmond," "[t]here were many changes that were made between the vetoed bill and the enacted plan in the Richmond area," and Morgan "was brought back in . . . to make changes such as that." 2nd Trial Tr. at 702. Although that testimony was somewhat vague, it means either that he split VTD 505 based on input from the Richmond registrar or that he did so on his own, in which case race was not considered. See 2nd Trial Tr. at 668, 702, 714-15. Either way, the split was not as McClellan described.

More importantly, however, as with VTDs 703 and 207, I am highly skeptical of McClellan's representation that the VTD 505 split was required by and based on the 55% BVAP rule. See, e.g., 2nd Trial Tr. at 42 ("So the way it was finally split in [sic] map as signed by the governor in 5005 was actually suggested [to Jones] by Delegate Carr and myself. So I don't remember exactly where the line was in the map as originally introduced, but we did attempt to keep 505 whole, and when we couldn't meet the target criteria, we just said, well, what's the most logical place to split it."); 2nd Trial Tr. at 59 ("[W]hen we drew a map that included 505 in one district or the other, it affected the [BVAP].").

That testimony should be considered in perspective of the clear record that there were numerous alternative configurations that would have permitted VTD 505 to move entirely into District 71. The portion

of VTD 505 in District 69 had a population of 1,245, a VAP of ~1,177, and a BVAP of 60. See Pl. Ex. 71 at 56. It seems that certain of District 71's predominantly white VTDs (e.g., 204, 208, 308, 309) could have been split to exclude a similar population. See Pl. Ex. 63 at 127-28; Pl. Ex. 69 at 18. Or, more simply, VTD 309 could have been ceded entirely to District 73 or District 72 and replaced by the District 69 portion of VTD 505. Doing so would have left District 71 with a BVAP of 55.5% and a population of 79,779. See Pl. Ex. 63 at 127-28; Pl. Ex. 71 at 56, 65; DI Ex. 38 at 7.

Based on that analysis (and as with VTDs 207 and 703), I cannot credit McClellan's testimony or believe that the VTD 505 split was racially motivated. That view is underscored by the fact that Plaintiffs did not call Carr to corroborate McClellan's testimony. And, Morgan suggested that the split was due to non-racial reasons. Furthermore, as with VTD 703, the split does not appear racial; it simply divided two predominantly white populations. Pl. Ex. 69 at 18. Finally, even if race were a considered, it was clearly a minimal factor, given that splitting VTD 505 was one of several options available to the legislature sufficient to meet 55% BVAP.

4. Conclusion as to District 71

In sum, Plaintiffs' evidence merely shows that race played a role in the design of District 71. See Pl. Post-Trial Br. at 31-32. It does not establish that race predominated. See Pl. Post-Trial Br. at 31-32. The design of District 71 was based upon numerous motivations and constraints, including political objectives, legislator preferences, avoiding incumbent pairs, making District 71 Richmond-centric, supporting

the needs of adjacent Districts, and maintaining 55% BVAP. By and large, moreover, the legislature accomplished these goals with minimal compromise; it satisfied legislator preferences, it did not pair incumbents, it improved District 71's Richmond-centrism, it provided for District 72's needs, and it met 55% BVAP. And, the specific line-drawing decisions made along the way that the majority considers to be strong evidence of racial predominance, I respectfully submit, do not support their conclusions for the reasons explained above. Hence, I conclude that race did not predominate in the design of District 71. And, even if I could not go so far as to make that affirmative conclusion, I think that, on the record as a whole, Plaintiffs have not met their burden to prove, by a preponderance of the evidence, that race was the predominant reason for drawing District 71.

ii. District 70

The majority treats District 70 as a BVAP "donor" District, and it points to its "donation" of VTDs 701, 702, part of 703, 811, and 903. Maj. Op. at 44. It highlights the facts that District 70 shifted nearly 26,000 people in and out; that "[t]he BVAP of areas moved out of District 70 was more than 16 percentage points higher than the BVAP of the areas moved in"; that District 70's BVAP ultimately dropped to 56.4%; and that District 70 initially required no changes to satisfy the target criteria. Maj. Op. at 44. In my view, however, Plaintiffs fail to establish racial predominance.

1. "Donations" to District 71

First, as set forth in the discussion of District 71, the transfer of VTDs 701, 702, and part of VTD 703 does not support a finding of racial predominance. Even if those VTDs were transferred to District 71 on the basis of race, moreover, that would not mean that race predominated as to District 70 as a whole.

2. "Donations" to District 69

Second, it is, I think, not accurate to consider the VTD transfers from District 70 to District 69 to be primarily BVAP donations. Although those transfers included VTDs 811, 903, and part of 609, which were predominantly African-American, they also included VTDs 402 and 508, which were heavily white. DI Ex. 92 at 5; DI Ex. 94 at 3. And, VTDs 402, 508, and 609 were added "to bring District 69 up to the James River," which associated District 69's border with a geographic boundary, made the District more compact, and "enhanced the district's alignment with a distinct political subdivision and community of interest" (Richmond). See Bethune-Hill, 141 F. Supp. 3d at 560; 2nd Trial Tr. at 703; DI Ex. 94 at 3.

The majority's theory to explain this is that, because District 69 received heavily white VTDs from District 70 to bring District 69 up to the James River, it also needed to receive VTDs 811 and 903 to maintain 55% BVAP. Maj. Op. at 46. But, if race were the predominant goal, it would be necessary to ask: why bother to transfer VTDs 402 and 508 to bring District 69 up to the James River at all? Would not the legislature have simply left District 69 alone and only incorporated high-BVAP VTDs from District 70 until it

reached its population target, so as to not risk falling below 55% BVAP?

Moreover, race-neutral reasons justified the transfer of VTDs 811 and 903. Morgan testified that the Richmond-area Districts, including District 69, were underpopulated, whereas the surrounding Districts (including in Chesterfield County) were overpopulated. 2nd Trial Tr. at 690-91. This issue was corrected "by bringing the Chesterfield population into District 70," i.e., by adding to that District the VTDs of Southside, Meadowbrook, Falling Creek, and Chippenham. See 2nd Trial Tr. at 691, 707; DI Ex. 94 at 3. District 70 was selected as the "vehicle" to bring the extra population into the Richmond area because it "already had a portion of Chesterfield County" and, "by taking [population] from the Chesterfield districts, it allows . . . [surrounding non-Challenged] districts to retain more of their core generally." 2nd Trial Tr. at 691-92, 706. Further, the areas of Chesterfield County that were added to District 70 were "fairly similar" to

(albeit more sparely populated than) other VTDs in that District. 2nd Trial Tr. at 706-08.[25, 26]

District 69, then, needed to pick up some of the surplus population obtained by District 70. 2nd Trial Tr. at 690-91. This was partially achieved by transferring VTDs 402, 508, and 609 to bring District 69 up to the James River. See DI Ex. 94 at 2-3. VTDs 811 and 903 were also chosen, and they both injected more population into District 70 and provided distinctly race-neutral advantages. VTD 811 had been split in the benchmark plan, but it was "unsplit" by the transfer to District 69. DI Ex. 91 at 139-40; DI Ex. 94 at 3. Furthermore, VTDs 811 and 903 improved District 69's compactness (vis-à-vis other District 70 VTDs) and promoted the District's eastward shift toward the James River and its Richmond-centrism (vis-à-vis VTDs from District 27 or District 68). See Bethune-Hill, 141 F. Supp. 3d at 560; DI Ex. 94 at 2-3. And, although VTDs 811 and 903 were predominantly

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[25] I recognize that District 69 had several VTDs in Chesterfield County in the benchmark plan and therefore conceivably could have been chosen as the "vehicle" to pick up the surplus population. 2nd Trial Tr. at 737-38; see also 2nd Trial Tr. at 691-92. The fact that it was not so chosen, however, is of no moment. The entire District was shifted east, at least in part to align with the James River, and it lost most of its Chesterfield VTDs in the process. DI Ex. 91 at 137-40; DI Ex. 94 at 2. To have used District 69 as the vehicle for capturing population in Chesterfield County would have counteracted that eastward shift and made it less Richmond-centric.

[26] McQuinn testified that she was concerned about gaining the Chesterfield VTDs. 2nd Trial Tr. at 103-05. But, she only "raised the question just informal . . . with one of the other delegates" and did not know why the change was made. 2nd Trial Tr. at 104-05.

African-American, that fact adds little to the analysis; that was true of every VTD in District 70 that bordered District 69 in the benchmark plan (with the exceptions of VTDs 402 and 508). See DI Ex. 92 at 7; DI Ex. 94 at 2-3.

Finally, the majority depends entirely on Dr. Rodden's analysis to support its conclusion that VTDs 811 and 903 were moved for racial purposes. See Maj. Op. at 44, 46. I believe that the foregoing analysis shows that an inference that race did not predominate is at least as plausible as an inference that it did. And, indeed, given that I do not find Dr. Rodden to be qualified in his motive testimony or otherwise credible, I do not think that an inference based on his testimony is valid at all.

3. Race-Neutral Explanations for Other of District 70's Boundaries

In addition to the boundaries described above, many other of the District 70 lines were set for largely non-racial purposes.

For example, the record indicates that the Belmont VTD was transferred from District 69 to District 70 to support District 69's eastward shift from Chesterfield County toward Richmond and the James River. See DI Ex. 94 at 2-3. Belmont was in Chesterfield County and, according to Dr. Rodden, had "about a 50/50 racial breakdown." 2nd Trial Tr. at 183-84; DI Ex. 94 at 2-3. It was replaced in District 69 by a portion of VTD 410, which portion was in Richmond and, compared to Belmont, had a similar population and substantially less BVAP. See Pl. Ex. 63 at 19-20, 127-28; Pl. Ex. 71 at 53; DI Ex. 94 at 2-3. The transfer of Belmont to

District 70 (and its replacement in District 69 with part of VTD 410) therefore reduced District 69's BVAP (from 55.5% to 55.2%). See Pl. Ex. 63 at 19-20; Pl. Ex. 71 at 53, 65; DI Ex. 38 at 7. It is unlikely that race played a role in that decision.

Additionally, District 70 retained its "northern turret," including the VTDs of Central Gardens, Masonic, part of 703, 705, and Montrose because: (1) McQuinn lived at the bottom of the turret; and (2) she wanted to retain the more northern VTDs. 2nd Trial Tr. at 537-38; 1st Trial Tr. at 311; see also DI Ex. 94 at 3.

Furthermore, Dorey was divided between Districts 70 and 61 in a "typical equal population split." 2nd Trial Tr. at 629-30, 708, 714-15, 731-32. For such splits, Morgan did not consider race. See 2nd Trial Tr. at 668, 714-15. And, VTD 609 was split between Districts 69 and 70 to allow "better contiguity for District 70." 2nd Trial Tr. at 704.

4. Generalized Population Data

The majority also points to evidence of generalized population shifts. Maj. Op. at 44. Respectfully, I do not find this evidence to be probative of racial predominance.

The majority's principal point is "nearly 26,000 people were moved out of District 70, and a different 26,000 were moved in." Maj. Op. at 44. But, the Court's previous opinion addressed that issue:

> Plaintiffs also argue that HD 70 was not under-populated before the redistricting process, but "the General Assembly added about 26,000

> people and removed about 26,000 people in redrawing the district." As discussed above, if properly populated districts were presumptively required to remain untouched, then all the other districts would need to wrap around them (in substantial disregard of neutral principles) in order to achieve population equality. Nor is the substitution in population numbers particularly shocking. If a properly populated district must shift locations, then it will necessarily "remove" a large amount of people from its old location and "add" the same amount from its new location. That result seems rather obvious.

Bethune-Hill, 141 F. Supp. 3d at 561-62 (citations omitted). I remain of that view and find that race only marginally accounts for these population shifts which concern the majority.

As set out above, the majority also notes an overall decrease in District 70's BVAP and a BVAP disparity between areas shifted into and out of the District. Maj. Op. at 44. However, this offers few insights into racial predominance in light of the foregoing analysis of specific District line decisions.

5. Conclusion as to District 70

In sum, although race influenced the design of District 70, the record shows that non-racial motives also played a significant role. Based on the record as a whole, I cannot find, by a preponderance of the evidence, that, among these motives, race was "the legislature's predominant motive for the design of the district as a whole," especially given that "courts must 'exercise extraordinary caution in adjudicating claims

that a State has drawn district lines on the basis of race.'" See Bethune-Hill, 137 S. Ct. at 797, 800 (citations omitted). Thus, I conclude that Plaintiffs have not met their burden to prove that race was the predominant factor in drawing District 70. See Pl. Post-Trial Br. at 35-36.

iii. District 69

The majority holds that race predominated based on the characteristics of the areas moved into and out of District 69. Maj. Op. at 45-47. Of course, reliance on such circumstantial evidence is permissible. But, that reliance requires making inferences as to motive, and I respectfully submit that the inferences drawn by the majority are insufficient to establish racial predominance by a preponderance of the evidence.

1. VTDs Beaufont & Manchester

The majority first highlights the fact that District 69 lost two largely white VTDs to District 27 to the west, notwithstanding that District 27 was overpopulated. Maj. Op. at 46. However, as discussed in the analysis of District 70, District 69 underwent an eastward shift out of Chesterfield County and toward Richmond and the James River, which rendered District 69 more compact, aligned it with a geographic boundary, and made it more Richmond-centric. Retaining District 69's western VTDs would have undermined that exercise. See DI Ex. 94 at 2. It is at least as likely that the decision to cede VTDs to District 27 was motivated by a desire to shift District 69 east as it is that the decision was motivated by race. Indeed, the VTDs District 69 lost to District 27, Beaufont and Manchester, were replaced by VTDs along the James

River (two of which were heavily white) that reduced District 69's BVAP (from 57%, albeit below the population minimum, to 55.2%). See Pl. Ex. 63 at 22-23, 127-28; Pl. Ex. 71 at 65; DI Ex. 38 at 7; DI Ex. 92 at 5.[27]

2. "Donations" from District 70

The majority also notes that District 69 gained VTDs from District 70 even though District 70 was already at population. Maj. Op. at 46. But, those VTD transfers have race-neutral explanations, as discussed in the analysis of District 70. Again, those explanations are at least as likely as race to have motivated the legislature.

3. VTD Splits

The majority additionally takes the view that, "[i]n both the VTDs split between District 69 and a non-challenged district, the portion of the split VTD allocated to District 69 had a higher BVAP than the portion of the split VTD allocated to the non-challenged district." Maj. Op. at 46. Those VTDs are 410 and Davis. Pl. Ex. 71 at 53.

As to VTD 410, it was split: (1) to equalize population; and (2) because some portion of VTD 410 needed to remain in District 68 to ensure its contiguity. See 2nd Trial Tr. at 704-06, 735-36. And, the location of the split in VTD 410 was not based on race but

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[27] Beaufont and Manchester had a combined population of 7,058, VAP of 5,269, and BVAP of 2,069 (39.3%). See Pl. Ex. 63 at 22-23. VTDs 402, 508, and 609 had a combined population of 7,729, VAP of 6,560, and BVAP of 1,686 (25.7%). See Pl. Ex. 63 at 127-28.

rather on Chippenham Parkway. 2nd Trial Tr. at 704-05, 736.[28] Moreover, Morgan chose where to split VTD 410 in HB 5005, and he did not consider race in splitting VTDs. 2nd Trial Tr. at 668, 705, 714-15, 735.[29]

As to Davis, we know little about that split. See 2nd Trial Tr. at 704. It appears, however, decidedly non-racial. The portion of Davis allocated to District 69 received about 84% of its population and about 86% of its BVAP. See Pl. Ex. 71 at 53. And, Dr. Rodden's dot density map of District 69 reveals that the Davis split followed no discernable racial pattern. Pl. Ex. 69 at 25. Indeed, Plaintiffs do not even discuss the Davis split, and nothing in the record suggests that this split was racially motivated. Pl. Post-Trial Br. at 33-34; see also 2nd Trial Tr. at 668, 704, 714-15. These VTD splits, therefore, do not in any way support a finding of racial predominance.

Finally, the majority points to the split of VTD 505. Maj. Op. at 46. For the reasons set forth in the

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[28] I recognize that Alabama deemed highway lines a disfavored boundary where, as here, they were "not mentioned in the legislative redistricting guidelines." Alabama, 135 S. Ct. at 1271-72. But, Morgan's testimony was that he sometimes identified local landmarks to make a neat VTD split and that he relied on a highway line, rather than race, in splitting VTD 410. 2nd Trial Tr. at 704-06, 736. In Alabama, there was no such evidence from any map drawer. See Alabama, 135 S. Ct. at 1271-72; Ala. Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1306 (M.D. Ala. 2013), vacated, 135 S. Ct. at 1274.

[29] Morgan testified that VTD 410 had been split in a different manner in HB 5001, and he set the split along Chippenham Parkway "in the last stages of the map-drawing." 2nd Trial Tr. at 704-05.

discussion of District 71, however, that split is not supportive of a finding of racial predominance.

4. Race-Neutral Explanations for Other of District 69's Boundaries

Moreover, the record shows that other segments of District 69's lines were clearly not racially motivated. For example, for the reasons discussed in the analysis of District 70, it is hard to see how the transfer of Belmont to District 70 and its replacement with part of VTD 410 was racial. Likewise, VTD 609 was split between Districts 69 and 70 to allow "better contiguity for District 70." 2nd Trial Tr. at 704.

5. Conclusion as to District 69

In short, the majority, as urged by Plaintiffs, primarily infers from circumstantial evidence that race was the legislature's predominant consideration. See Pl. Post-Trial Br. at 33-34.[30] For the foregoing reasons, I respectfully conclude that such an inference is insufficiently supported on the record because it is at least as likely that race did not predominate as that it did. Accordingly, Plaintiffs have not carried their burden of establishing racial predominance by a preponderance of the evidence.

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[30] Plaintiffs do additionally claim that District 69 "was drawn to comply with the 55% BVAP target," citing McClellan's testimony. Pl. Post-Trial Br. at 33 (emphasis added). But, she merely indicated that District 69 (like the other Richmond Districts) was subject to the 55% BVAP rule. 1st Trial Tr. at 29. That is undisputed, and it does not, as the Supreme Court held, carry the day. In any case, as explained in the analysis of District 71, McClellan's view of whether District lines were racially motivated cannot be credited.

iv. District 63

The majority concludes that race predominated as to District 63 because the District's design was based largely on the BVAP and population needs of District 75, where it is established that race predominated. Maj. Op. at 48-50. Although it is true that the configuration of District 75 affected the boundaries of District 63, that is not a sufficient ground to support a conclusion of racial predominance, in perspective of the record taken as a whole. The decision to split Dinwiddie County between Districts 75 and 63 was previously determined to have had a racial purpose. Maj. Op. at 48-49; Bethune-Hill, 141 F. Supp. 3d 553-54. However, the Court's previous opinion also found that the legislature had non-racial motivations for configuring the split as it did and that the split of Dinwiddie County did not establish racial predominance as to District 63 as a whole. Bethune-Hill, 141 F. Supp. 3d 553-55. I reach the same finding here, and I have found nothing in the record that alters that conclusion.

1. The Split of Dinwiddie County

The majority focuses little on the legislative intent underlying the split of Dinwiddie County. Rather, the majority mainly highlights the fact that the Court previously deemed this split to be "avowedly racial." Maj. Op. at 48-49. But, as just noted, the Court's previous opinion did not hold that the split of Dinwiddie County was sufficient, alone, to establish racial predominance. Bethune-Hill, 141 F. Supp. 3d 553-55. And, it found that both political and racial motives were involved in the configuration of the split. Id. at 553-54.

Indeed, the only decisional aspect of the split of Dinwiddie County that the majority specifically discusses is the "oddly shaped 'hook' around New Hope." Maj. Op. at 49 n.35. It does not characterize that hook as racially motivated. Maj. Op. at 49 n.35. Instead, it merely points to an inconsistency between the testimony of Delegate Dance (of District 63) and Jones and to the fact that Jones "equivocated" as to the reason for the hook at the second trial. Maj. Op. at 49 n.35. This perceived "equivocation" consisted entirely of Jones stating: "My memory – of course, you have to – you know, I probably talked to 70 plus members in the whole process in a very compressed timeline. I thought that initially that the finger had to do with a primary – a potential primary component [sic], but my memory could be refreshed." 2nd Trial Tr. at 493.

Jones otherwise offered clear testimony as to the creation of the hook, however. He testified, for instance that the reason for the hook was that Dance requested that the New Hope VTD, which borders the hook, remain in her District. 2nd Trial Tr. at 492-95; 1st Trial Tr. at 325-27. According to him, New Hope originally was not going to be in District 63 at all, but Dance had worked very hard and so New Hope was added to it. 2nd Trial Tr. at 495. Morgan largely confirmed that statement. 2nd Trial Tr. at 713-14. The "hook," therefore, was simply what remained in District 75 after New Hope was added to District 63. 2nd Trial Tr. at 495.

Jones believed that this "remainder" was designed to draw a potential primary challenger out of District 63. 1st Trial Tr. at 326. He explained that the area "was negotiated between Delegate Dance, Delegate

Tyler, and [him]," that "the boundary, from [Jones'] perspective, really wasn't a highest priority," and that otherwise he "would never have drawn" the hook. 2nd Trial Tr. at 492-95; 1st Trial Tr. at 325-26. That was corroborated by Morgan, who stated that the area including and near the hook: "was negotiated between Delegate Dance, Delegate Jones, and Delegate Tyler. Once that boundary was negotiated, it was not changed." 2nd Trial Tr. at 714.

It is true, as the majority notes, that Dance testified at the second trial that she did not request the hook or have a primary challenger who lived there. Maj. Op. at 49 n.35; 2nd Trial Tr. at 118. However, I credit Jones' testimony at the first trial over Dance's testimony at the second, given that memories fade and that Dance did not testify to that effect in the first trial. Furthermore, Jones' testimony confirms that, at minimum, he did not demand or impose the hook shape to ensure compliance with the 55% BVAP target. Rather, he perceived it to be the result of political negotiations. Even if Jones were mistaken, a mistaken political justification is still non-racial.

2. Hopewell & Prince George County

The majority attempts to show that race predominated by tying the split of Dinwiddie County to the addition of areas of Hopewell and Prince George County to District 63. Maj. Op. at 48-49. It points to Dance's testimony that District 63 incorporated these areas to increase its BVAP after losing BVAP to District 75. Maj. Op. at 49. But, Dance's testimony was addressed in the Court's previous opinion:

> However, the record shows that the eastern border advanced other criteria, both neutral and political. In order to unwind the water crossing in the Benchmark HD 74, Delegate Jones decided to move precincts in Hopewell City out of HD 74 and into HD 63. Thus, HD 63's eastern configuration improved HD 74's adherence to contiguity conventions. Moreover, by placing these precincts in HD 63 rather than HD 62 or HD 64, the District's eastern boundary avoids solving the water crossing problem to the detriment of Republican districts on either side.

See Bethune-Hill, 141 F. Supp. 3d at 554 (citations omitted).

Those findings, to which I fully subscribe again, are well supported by the record. Jones testified that his motivation for moving portions of Hopewell into District 63 from District 74 was to correct a crossing of the James River Tidal Estuary in District 74. 2nd Trial Tr. at 480-81, 543-44; 1st Trial Tr. at 316-17, 328-29.[31,32] Jones further explained that race had nothing to

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[31] Note that certain river crossings were permitted in HB 5005. See, e.g., DI Ex. 91 at 138; see also 2nd Trial Tr. at 525. However, Morgan stated that crossings of the James River Tidal Estuary (which were larger than other crossings and had been challenged previously in litigation) were to be avoided. 2nd Trial Tr. at 650-51.

[32] Plaintiffs make much of the fact that the Supreme Court of Virginia upheld the Hopewell river crossing over a state constitutional challenge. Pl. Post-Trial Br. at 38 n.13. However, Jones clarified that he wanted to correct the river crossing, even though it had been upheld, based on political concerns. 2nd Trial Tr. at 480. People had perceived river crossings negatively (e.g.,

do with his decision to correct that crossing and that he kept the split of Hopewell as it existed in the benchmark plan. 2nd Trial Tr. at 481, 523-24; 1st Trial Tr. at 317. Morgan attested, moreover, that Hopewell remained split (now between Districts 62 and 63 rather than between Districts 62 and 74) in order to place outside District 62 the areas of Hopewell that the District 62 incumbent, Delegate Riley Ingram, had not represented from 2001 to 2011. 2nd Trial Tr. at 710-12, 751-52; see also DI Ex. 91 at 123-24. And, Morgan made clear, District 62 had already undergone major changes and the areas of Hopewell allocated to District 63 were "heavily Democratic and would have affected [Ingram's] election." 2nd Trial Tr. at 710-12. Jones confirmed that Ingram's District "was in the top three of the most changed districts" and that moving Hopewell entirely into District 62 "would have certainly made it more problematic for [Ingram's] reelection." 2nd Trial Tr. at 493-94.

A few other points respecting Hopewell are worth noting. First, if there is a correlation between race and politics, it is not surprising that a split of Hopewell along party lines would also appear racial. See Cooper v. Harris, 137 S. Ct. 1455, 1473 (2017). Second, Morgan testified that including Hopewell in District 63 was not necessary for it to achieve 55% BVAP. 2nd Trial Tr. at 712, 753. That testimony was corroborated by Dr. Rodden, who stated that District 63: "ended up exceeding the [55% BVAP] target substantially. So this

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describing District 64 as the "ferrymandered district"), "so there was some concern about going across the river where there wasn't a direct, quote, unquote, you know, bridge or access point." 2nd Trial Tr. at 480.

is a situation where it could have been drawn in a number of different ways to reach that target." 2nd Trial Tr. at 215. On such a record, the 55% BVAP target, and hence race, cannot be found to have affected the District lines as to the eastern portion of District 63.[33]

3. VTD Splits

Finally, the majority underscores VTD splits in District 63 as evidence of racial predominance. Maj. Op. at 50. Specifically, it points to the split of Ward 7 in Hopewell, and it notes a pattern of allocating more BVAP to District 63 than to non-Challenged Districts in split VTDs. Maj. Op. at 50.

Morgan, however, testified that the split of Ward 7 was to equalize population and that he chose to split Ward 7 where he did because of the geography of census blocks. 2nd Trial Tr. at 748-49. Jones maintained that he was not involved in splitting that VTD, and Morgan did not take race into account when he split VTDs alone. 2nd Trial Tr. at 494, 668, 714-15.

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[33] Dance may well have believed that District 63 incorporated portions of Hopewell for racial reasons. See 2nd Trial Tr. at 116-17; 1st Trial Tr. at 81. As an initial matter, however, I have trouble crediting her view, for previously stated reasons. And, in any case, her position was undermined by the fact that both Morgan and Dr. Rodden testified that District 63 was not substantially constrained by the 55% BVAP target. Furthermore, Dance insisted at the second trial that, for the most part, she "didn't really pick [her] district" and "they stretched [her] in whatever direction they were to take [her]." 2nd Trial Tr. at 125. Therefore, I credit the testimony of Jones and Morgan as to the reasons for District 63's design over that given by Dance on this point.

As elsewhere, I accept the testimony of Jones and Morgan.

The other VTD splits between District 63 and non-Challenged Districts occurred in the Rives, Jefferson Park, and Courts Building VTDs. Pl. Ex. 71 at 52. As to Rives, Morgan attested that it was split among Districts 62, 63, and 64 to balance population in light of difficult census block geography and because that was an area where different geographic regions merged. 2nd Trial Tr. at 745.[34] The location of the split was set on the north side at Highway 36 and on the south side at I-295. 2nd Trial Tr. at 745. As to Jefferson Park, Morgan testified that it was split for similar reasons. 2nd Trial Tr. at 745, 748. And, as to Courts Building, Morgan explained that it was split for similar reasons and because of an island in the river. 2nd Trial Tr. at 745-46, 748. Jones had no involvement in these VTD splits, meaning that Morgan split them on his own and did not consider race. 2nd Trial Tr. at 494, 668, 714-15. Thus, these VTD splits in no way suggest that race predominated.

4. Conclusion as to District 63

In short, the only confirmed racial motive in designing District 63 involved the split of Dinwiddie County. However, other motives clearly influenced District 63 as a whole, including fixing a river crossing, political considerations, and incumbent requests. On this record, it is not shown which of these factors

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[34] This VTD was referred to as "Reams." 2nd Trial Tr. at 745-46. Based on the context, however, it seems that what was meant was "Rives." See 2nd Trial Tr. at 745-46; DI Ex. 91 at 126; DI Ex. 94 at 1.

predominated, and Plaintiffs have not met their burden to prove, by a preponderance of the evidence, that race was the predominant reason for drawing District 63 as it was drawn. See Pl. Post-Trial Br. at 28-30.

v. District 74

The majority takes the view that "[D]istrict 74 served as a 'donor' district to surrounding challenged districts that needed an influx of BVAP to reach the 55% BVAP threshold." Maj. Op. at 51-52. I cannot agree.

1. Generalized Population Data

The majority first points to the facts that: (1) "16,414 people were moved out of District 74, and 15,855 were moved [in]"; and (2) "the BVAP of the areas removed from District 74 and transferred to other challenged districts was 69%, whereas the BVAP of areas moved from District 74 to non-challenged districts was only 20.5%." Maj. Op. at 52. The fact that people were moved into and out of a District does not, on its own, establish anything. See Bethune-Hill, 141 F. Supp. 3d at 561-62. And, the fact that more BVAP was moved from District 74 to Challenged Districts than to non-Challenged Districts is of little evidentiary value given the race-neutral explanations for the changes to District 74's boundaries detailed below.

2. Specific Line-Drawing Decisions

The majority then moves on to address specific changes in the District lines. In particular, it emphasizes the move of: (1) the Ratcliffe VTD from District 74 to District 71; and (2) portions of Hopewell from District 74 to District 63. Maj. Op. at 52-53.

As to Ratcliffe, as discussed in the analysis of District 71, race was only part of the reason for adding that VTD. And, even if the transfer were entirely racial, that would not establish racial predominance as to District 74 as a whole.

The significance of the portions of Hopewell that were transferred from District 74 to District 63 is addressed in the analysis of District 63. In brief, however, that alteration was intended to correct a river crossing while minimizing political impact, and it does not suggest racial predominance. And, it is worth repeating that transferring Hopewell to District 63 was not even necessary for that District to achieve 55% BVAP. 2nd Trial Tr. at 215, 712, 753. That evidence, taken together, I think undermines the theory that District 74 "served as a 'donor' district to surrounding challenged districts that needed an influx of BVAP to reach the 55% BVAP threshold." Maj. Op. at 51-52 (emphasis added).

3. VTD Splits

Finally, the majority highlights the fact that, "in all three VTDs split between District 74 and a non-challenged district, the portion of the VTD allocated to District 74 had a higher BVAP than the portion allocated to a non-challenged district." Maj. Op. at 53. Those VTDs are Moody, Brookland, and Belmont. Pl. Ex. 71 at 53.

Morgan explained that the Belmont split was intended to allow Canterbury, "a strong Republican-performing precinct," to transfer to District 72. 2nd Trial Tr. at 696. Canterbury was on the far side of Belmont from District 72, so at least some of Belmont

needed to go to District 72 to permit the transfer. See DI Ex. 91 at 144.

Morgan also confirmed that a river formed part of the boundary between Districts 74 and 72 in the area where these VTDs were split because that "had a better impact on compactness for District 72, which was one of the least compact districts in the entire plan." 2nd Trial Tr. at 696-97. The issue of District 72's compactness was important enough that it was the topic of specific discussions between Morgan and Jones. See 2nd Trial Tr. at 697.

The river boundary between Districts 72 and 74 ended at the Moody-Brookland border. DI Ex. 91 at 143-44. At that point, the District 74 line followed State Road 73 for a time before splitting Brookland at its narrowest point and then continuing upwards along VTD boundary lines. DI Ex. 91 at 143-44. Thus, the "river"/compactness justification applies to Belmont and Moody but not the Brookland VTD. As to that VTD, Morgan testified that it was split for population equalization. 2nd Trial Tr. at 740. Given that the other VTDs were split along a river boundary for specific reasons, it was reasonable to split a third VTD between Districts 74 and 72 at a geographically convenient point to equalize population.

Further, Jones was not involved in splitting these three VTDs. 2nd Trial Tr. at 496-97, 697. That means that they were split by Morgan in a race-blind manner. 2nd Trial Tr. at 668, 714-15. Hence, because the splits were largely for compactness and political purposes and not racial purposes, they do not evince racial predominance and, in fact, point to the conclusion that race did not predominate.

4. Race-Neutral Explanations for Other of District 74's Boundaries

Additionally, other aspects of District 74's lines were clearly non-racial. For instance, Morgan testified that VTDs Nine Mile, Chickahominy, and Antioch were added to District 74's northwestern appendage to "round[] out the district up to the county line," i.e., "to bring the northern fragment of Henrico County into District 74 away from District 97 which was primarily a Hanover and New Kent district." 2nd Trial Tr. at 693-94; see also DI Ex. 91 at 147-48. Jones similarly noted that he "took three or four precincts out of 97 which then undid one more jurisdictional split." 2nd Trial Tr. at 545-46. All of these VTDs were predominantly white, and Chickahominy and Antioch were heavily so. See DI Ex. 92 at 11; see also DI Ex. 91 at 147-48.

Likewise, District 74 extracted the heavily African-American VTD 301 from District 71, notwithstanding that District 71 "had the lowest BVAP of any of the challenged districts." See Maj. Op. at 38; Pl. Ex. at 18. That move could not have been racially motivated because the theory of racial intent is that "District 74 served as a 'donor' district to surrounding challenged districts that needed an influx of BVAP." See Maj. Op. at 51.[35]

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[35] At this point, I respectfully submit that the majority's BVAP donor theory cannot reasonably be supported. District 74 "unnecessarily" donated Hopewell to District 63 and extracted a high-BVAP area from a District 71, which had a significant "need" for BVAP.

5. Conclusion as to District 74

In sum, the record, viewed as a whole, does not show that race was the predominant motive in designing District 74. Thus, Plaintiffs have not met their burden to prove that it was. See Pl. Post-Trial Br. at 37-38.

B. The North Hampton Roads Region

i. District 95

The majority mainly emphasizes the addition of a narrow appendage to the northwest of District 95 as the driver for its conclusion that race predominated in the drawing of District 95. Maj. Op. at 56. It claims that this appendage caused a significant reduction in compactness and split five VTDs (and did so such that the portions allocated to District 95 had greater BVAP). Maj. Op. at 56. It adopts Dr. Rodden's opinion that the VTDs at the top of the appendage, Jenkins, Denbigh, Epes, and Reservoir, were split precisely along racial lines. Maj. Op. at 57. And, the majority asserts that Dr. Palmer found strong positive correlations between race and the likelihood of inclusion in District 95. Maj. Op. at 56-57. The majority also rejects Morgan's explanation for the VTD splits and determines that because "only population, race, and ethnicity data were available at the census block level," the VTD splits must have been racial. Maj. Op. at 57, 57 n.42. Finally, the majority contends that District 95 used its new appendage to transfer BVAP to District 92 so that District 92 could meet the population equality and 55% BVAP targets. Maj. Op. at 58. And, it did so, transferring over 18,000 people into District 92,

notwithstanding that District 95 had a population deficit of 12,000 people. Maj. Op. at 58.

Here too, as with several other Districts, the majority's conclusions are based on inferences from circumstantial evidence, and, of course, it is permissible to make decisions on the basis of circumstantial evidence. However, I find that these inferences are insufficient to establish racial predominance in light of the voluminous direct evidence of race-neutral intent.

1. VTDs Transferred to District 92

Morgan and Jones made clear that VTDs from Hampton (Kraft, Forrest, Mallory, and Wythe) were transferred from District 95 to District 92 in order to reduce District 95's footprint in Hampton. See 2nd Trial Tr. at 680, 687; 1st Trial Tr. at 356-57; DI Ex. 94 at 14. Jones said that this result was a priority for the District 92 incumbent, Delegate Jeion Ward, and that he drew District 92 as he did for that reason. 2nd Trial Tr. at 562; 1st Trial Tr. at 356-57.

2. District 95's Northern Appendage

To make those VTD transfers to District 92 feasible, "District 95 need[ed] to gain population," which it did "by stretching north towards where the surplus was." 2nd Trial Tr. at 680. But, the manner in which it did so was intended largely to accomplish political goals. Specifically, the northern appendage was primarily designed: (1) to remove Democratic VTDs (Reservoir and Epes) from District 93 to make it more of a swing District; and (2) to draw the District 93 incumbent, Delegate Robin Abbott, out of her District without pairing her with the District 95 incumbent, Delegate

Mamye BaCotes. 2nd Trial Tr. at 508-10, 562, 675-78, 757-60; 1st Trial Tr. at 371-73. Additionally, as the Court previously found, "[a]ccording to Delegate Jones, the district's movement north follows heavily Democratic precincts and then narrowly jumps through two Republican precincts in order to capture another strongly Democratic voting area at its northernmost tip." Bethune-Hill, 141 F. Supp. 3d at 570; see also 1st Trial Tr. at 369-70; DI Ex. 92 at 24.

To accomplish the first goal while also complying with population requirements, it was necessary to split the VTDs leading up to Reservoir and Epes (including Jenkins, Denbigh, and Epes). 2nd Trial Tr. at 678, 757-59. Reservoir, in turn, was split among Districts 93, 94, and 95 to account for the difficult census geography of Reservoir while also removing as much of Reservoir from District 93 as possible. 2nd Trial Tr. at 639-40, 677-79, 759-60.

This exercise in no way required Morgan to rely on racial data or to use racial data at the census block level as a proxy for politics because his goal was to "tak[e] as much as possible of Epes and Reservoir out of 93." 2nd Trial Tr. at 679. And, indeed, he succeeded, having removed all of Epes and most of Reservoir from District 93. 2nd Trial Tr. at 679.

To accomplish the second goal, it was necessary to maneuver the northern appendage around Abbot's residence, which was in Deer Park. See 1st Trial Tr. at 371-72; DI Ex. 94 at 14. Hence, according to Jones, it

followed Sandy Bottom, Saunders, and Palmer instead of going "straight[] up." 1st Trial Tr. at 371-72.[36]

3. The Majority's Inferences

In light of these race-neutral explanations for District 95's shape, the inferences relied upon by the majority are not persuasive that race primarily animated the design of District 95. True, District 95's compactness fell, but it did so primarily for political reasons. True, there were several VTD splits, but most were necessary to extract Epes and Reservoir from District 93 while complying with population requirements. True, the northern VTD splits appear to encompass African-American populations, but that is irrelevant if the person splitting the VTDs did not consider race data. True, there may have been a positive correlation between race and inclusion in District 95, but any general correlation is largely irrelevant if District 95's boundaries were set mainly on race-neutral bases (especially if these bases were

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[36] The record offers little explanation of why VTDs Deer Park and Palmer were split. It is fairly clear that the Deer Park split snaked around Abbott's residence, but it could have been "unsplit" and accomplished the same goal. See DI Ex. 94 at 14; see also DI Ex. 91 at 190. Dr. Rodden's dot density map, however, suggests that those splits had more to do with avoiding populated areas (to allow District 95 to achieve the political goals set forth above) than anything else. See Pl. Ex. 69 at 45; DI Ex. 94 at 14. According to Dr. Palmer's data, moreover, the portion of the Palmer VTD assigned to District 95 had a BVAP of 26.6%, whereas the portion assigned to District 94 had a BVAP of 17.6%; and, District 95 obtained ~64% of Palmer's population and ~73% of its BVAP. See Pl. Ex. 71 at 55. Thus, although there was some disparity, it was not substantial. Dr. Palmer did not offer any data on the Deer Park VTD split. See Pl. Ex. 71 at 55.

political and there is a correlation between race and party). See Cooper, 137 S. Ct. at 1473; see also DI Ex. 101 at 2, 11-12.[37] True, political data are not available at the census block level, but that is immaterial since the map drawer was trying to remove as much of certain VTDs as possible. And, true, District 95 may have lost BVAP and population to District 92, notwithstanding its own population deficit, but it did so for race-neutral reasons.

4. Delegate Jones' Statements

Plaintiffs point to some additional direct evidence. Specifically, they highlight the following statement by Jones made during the redistricting floor debates:

> If you're familiar with the geography down in our neck of the woods, in Norcross and Suffolk to the Peninsula, all those districts are down in the very bottom [of population loss]. So what had to happen, the population had to be picked up, had to try to maintain the voting strength for the black voting percentage. So naturally you would take some of those, those precincts and you had

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[37] The majority mentions two correlations found by Dr. Palmer. The first is a "relationship between BVAP and the likelihood that a census block would be assigned to District 95." Maj. Op. at 56. The second is a finding "that black residents previously located in non-challenged District 94 were seven times more likely to be moved into District 95 than white residents." Maj. Op. at 56-57. The first correlation was flawed for the reasons illustrated by Dr. Katz. See DI Ex. 101 at 2, 11-12. The second provides no meaningful insight into the racial predominance question, given the direct evidence of race-neutral motives.

> to move and change it to picked [sic] up population.

See Pl. Ex. 35 at 153; Pl. Post-Trial Br. at 46.

That statement does not alter my assessment of District 95, however. First, it was in response to a question as to why District 93 (and others) had lost BVAP (in HB 5001). Pl. Ex. 35 at 152-53. Jones' answer therefore would not have addressed the race-neutral motivations for the changes to Districts 92 and 95. Second, it is undisputed that the 55% BVAP target existed and hence in some way influenced the design of the Districts. Indeed, Jones testified that, as with every Challenged District, he considered race in drawing District 95. 1st Trial Tr. at 372; see also 2nd Trial Tr. at 521. So, a statement during a floor debate that Jones sought to preserve BVAP in response to a question about BVAP is unsurprising. And, finally, Dr. Rodden maintained that Districts 92 and 95 had high final BVAP numbers, so there "were many different ways to achieve the 55 percent target," and that there "was no need to split any of [District 95's northern] precincts to maintain [55% BVAP]." 2nd Trial Tr. at 244, 343. Morgan concurred. 2nd Trial Tr. at 681-82. Accordingly, Jones' statement does not establish that race predominated.

5. Conclusion as to District 95

The record, as a whole, respecting District 95 shows that Plaintiffs have not met their burden to prove that race predominated in the design that District. See Pl. Post-Trial Br. at 46-48.

ii. District 92

1. District 92's Connection to District 95

The majority's holding as to District 92 is entirely based on the view that "the construction of District 92 was 'intimately connected' with the plainly race-based decisions made in District 95." Maj. Op. at 60 (citations omitted). In that regard, the majority notes that District 95 gained population and BVAP by way of its northern appendage and then transferred three high-BVAP VTDs (Kraft, Forrest, and Mallory) into District 92, totaling approximately 16,000 people. Maj. Op. at 60. And, it observes that, "[w]ithout this donation of significant population from District 95, the legislature would have been forced to expand the boundaries of District 92 into heavily white precincts, negatively impacting [BVAP]." Maj. Op. at 60.

As discussed in assessing District 95, that District was designed largely to achieve political goals. And, the shift of VTDs from District 95 to District 92 was intended to reduce District 95's footprint in Hampton. That same reasoning puts me at odds with the majority's views of District 92.

2. Other Evidence that Race Played a Minimal Role in the Design of District 92

Additionally, District 92 was not otherwise heavily influenced by racial considerations. First, as with District 95, Morgan and Dr. Rodden testified that the 55% BVAP target was not a significant constraint on the District 92 boundaries. 2nd Trial Tr. at 244, 681-82. Indeed, according to Morgan, adding the Bryan VTD to

District 92, one of the "heavily white precincts" into which District 92 could have expanded, would not have reduced BVAP below 55%. See 2nd Trial Tr. at 687-88. Second (and relatedly), Wythe, a Hampton VTD, was added to District 92 from District 95, notwithstanding the fact that, as the majority observes in a footnote, "Wythe had a total population of 2,330, with a 17.6% BVAP." Maj. Op. at 60 n.45. Third, Jones explained that VTD Phoebus was removed from District 92 to be paired with a community of interest in Bryan. 2nd Trial Tr. at 563. And, finally, the majority acknowledges that "the district's compactness score improved from the 2001 plan, and the number of split VTDs declined from three to zero." Maj. Op. at 59.

3. Conclusion as to District 92

In my view, the record refutes a finding that District 92 was drawn predominantly for racial reasons. At a minimum, the record, viewed as a whole, establishes that Plaintiffs have not met their burden of proof as to District 92. See Pl. Post-Trial Br. at 46-48.

C. The South Hampton Roads Region

i. District 80

For its finding as to District 80, the majority makes the following points: (1) 22,000 people were moved out of District 80 and 32,000 were moved in; (2) white residents were moved from District 80 to District 79 at three times the rate African-American residents, with 29.4% BVAP in the transferred population; (3) District 80 became less compact and ultimately resembled a sideways "S"; (4) this sideways "S" was created by adding a western appendage to the District (which included a new water crossing and ran through several

municipalities), and that decision was racially motivated because it incorporated one primarily white VTD (Thirty-Four) to reach three largely African-American VTDs (Thirty-Eight, Taylor Road, and Yeats); and (5) although only one populated VTD was split, that split was made along racial lines. Maj. Op. at 64-65.

To me, however, those points do not support an inference of a predominantly racial motive by a preponderance of the evidence. That is because the record shows otherwise by direct, credible evidence.

1. Generalized Population Data & the Shape of District 80

As an initial matter, I find here (as elsewhere) that the generalized population data are not compelling. As discussed above, mere population shifts, standing alone, do not indicate racial predominance and are not even a surprising phenomenon. See Bethune-Hill, 141 F. Supp. 3d at 561-62. That is particularly so here given that the broad population movements toward Northern Virginia, described in greater detail above, especially affected the Hampton Roads region. See 2nd Trial Tr. at 476-78; 1st Trial Tr. at 350. Further, a bizarre shape does not, standing alone, demonstrate racial predominance. Bethune-Hill, 137 S. Ct. at 798 ("The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications."). And, the remaining generalized data are not persuasive, given my particularized analysis of District 80's lines.

2. District 80's Western Appendage

District 80's western appendage consisted entirely of VTDs brought in from District 79. DI Ex. 94 at 10.

Jones made clear that the reason he transferred those VTDs was to benefit (and satisfy the requests of) the incumbent in District 79, Delegate Johnny Joannou, who was a very conservative Democrat. See 2nd Trial Tr. at 500, 503. Jones made clear that this shift removed some Democratic VTDs from Joannou's District and that Joannou "did not want to have four jurisdictions" in his District. 2nd Trial Tr. at 500, 503, 553. Morgan similarly observed "that taking Delegate Joannou's concerns were an important factor at driving the redistricting process." 2nd Trial Tr. at 656-57.[38]

Jones also described other constraints that influenced the western segment of District 80. First, he did not want to cross the James River (Tidal Estuary) and was otherwise limited by the North Carolina border and the ocean. See 1st Trial Tr. at 350. Morgan corroborated Jones' desire not to cross the James River Tidal Estuary. 2nd Trial Tr. at 650-51. Second, Jones established that he did not want to move the VTDs "avoided" by the western loop of the sideways S, Silverwood, Churchland, Fellowship, and Nansemond, into District 80 because they were in Jones' District (76), they were "very Republican," and Jones "was a patron of the bill." 2nd Trial Tr. at 553-54; see also DI Ex. 94 at 10. Third, Jones clarified that he wanted to avoid pairing incumbents, so the residences of Joannou (in VTD Thirty-Five) and of James (in VTD Thirty-

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[38] Relatedly, Morgan said that Jones did not want those VTDs from District 79 to transfer to his District (76), which was in the same region. 2nd Trial Tr. at 649; DI Ex. 91 at 160. Given that Jones perceived those VTDs to be Democratic, it is reasonable to assume that politics was the reason for that preference. See 2nd Trial Tr. at 500.

Eight) presented further limitations that affected the drawing of District 80. 1st Trial Tr. at 350; see also DI Ex. 94 at 10.

Jones expressly denied that he "excluded" predominantly African-American regions in drawing the western portion of District 80. 2nd Trial Tr. at 554. Rather, "[a]ll [he] did was take the current configuration of 79th on the western edge and use that for the 80th." 2nd Trial Tr. at 554. His testimony is supported by the record just discussed. See DI Ex. 94 at 10.

Morgan added another, similar reason for the design of the western segment. He explained that District 79 was certain to be paired with portions of Norfolk during the redistricting process. 2nd Trial Tr. at 655. However, Morgan "had concerns that . . . taking population away from Johnny Joannou in Portsmouth and putting population in Norfolk would change the balance of [Joannou's] district" because "[t]he core of his district and his political base . . . was in Portsmouth." 2nd Trial Tr. at 647. The solution on the Norfolk side of the water was to pair District 79 with the Norfolk Naval Base, which had "a lot of population and fewer voters" and "would be less of a difficulty for [Joannou] to contend with in a potential primary." 2nd Trial Tr. at 647, 655-56. To account for that pairing, District 79 transferred the western VTDs to District 80. 2nd Trial Tr. at 649, 651-53, 655-56. Morgan made clear that this change benefitted Joannou because his "core was Portsmouth." See 2nd Trial Tr. at 655-56. Indeed, the transfer removed from District 79 its only non-Portsmouth VTDs outside of Norfolk (Yeates, Harbor View, and Taylor Road). DI Ex. 94 at 10; see

also DI Ex. 91 at 157-58. It therefore minimized District 79's Portsmouth losses.

3. District 80's Eastern Segment

The design of District 80's eastern portion likewise was driven by non-racial reasons. As discussed in greater detail in the analysis of District 77, Jones and Morgan attested that the Johnson Park VTD was transferred from District 80 to District 77 as part of a series of requests made by Delegate Spruill of District 80 "for compactness, contiguity, community of interests, and the like." 2nd Trial Tr. at 497-98, 550, 652, 657; 1st Trial Tr. at 334-37. And, Morgan testified that the Berkley, Old Dominion, Taylor Elementary School, and Hunton Y VTDs were transferred from District 80 to District 89 to "reduce[] the footprint of District 80" in Norfolk. See 2nd Trial Tr. at 652.[39] Additionally, Jones explained that Berkley was shifted to District 89 because the incumbent, Delegate Kenny Alexander, had a funeral home in that VTD. 2nd Trial Tr. at 504, 559.[40] Finally, Morgan confirmed that Chrysler Museum, a heavily white Norfolk VTD,

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[39] Hence, the fact that transferring Berkley from District 80 to District 89 created a river crossing is largely irrelevant, given that the Norfolk boundary crossed the river at Berkley. 2nd Trial Tr. at 763; DI Ex. 94 at 10. And, that move corrected a water crossing in District 80 as well. DI Ex. 94 at 10.

[40] The majority contends that the removal of the Berkeley VTD from District 80 was not beneficial to James. Maj. Op. at 66 n.47. That may well be true, but benefiting James was not the reason proffered for that removal. As set out above, the reasons were to reduce District 80's footprint in Norfolk and to move a business of the District 89 incumbent into that District.

remained in District 80 in order to aid Joannou by avoiding "adding more strongly voting population" from Norfolk. See 2nd Trial Tr. at 652; DI Ex. 92 at 17.

4. Other Changes to District 80

There are certain changes to District 80 about which the record shows little, i.e., the shift of VTD Eleven into District 80 from District 79 and the shift of most of VTD Nine and all of VTD Seven into District 79 from District 80. See DI Ex. 94 at 10.[41] However, any assertion that these changes were primarily a function of racial motive raises significant questions. For example, why did District 80 lose all of VTD Seven, given that it was majority African-American and distinctly amenable to a split along racial lines? See Pl. Ex. 69 at 53; DI Ex. 92 at 17. Likewise, why was VTD Nine (the VTD the majority views as split along racial lines) divided so as to exclude a large African-American population directly adjacent the District 80 boundary? See Maj. Op. at 65; Pl. Ex. 69 at 53. These unanswered questions and the consequent evidentiary void go against Plaintiffs because they have the burden of proof.

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[41] VTD Eleven may have been added to District 80 for some of the same reasons as the western appendage. Jones testified that he believed that the VTDs he pulled out of District 79 would benefit Joannou, and he did not differentiate among them. 2nd Trial Tr. at 503.

5. Questions Raised by an Assertion of Racial Predominance in the Design of District 80

Any claim that race predominated as to District 80 as a whole (as opposed to just with respect to VTDs Seven, Nine, and Eleven) raises a host of similar questions. Indeed, if race were truly the predominant consideration in the drawing of District 80, why build a long, narrow corridor made up of two heavily white VTDs to reach two predominantly African-American and two predominantly white VTDs far to the west (and thus create an appendage with a total BVAP of 49.3%)? See Pl. Ex. 63 at 106-07, 124-25, 127-28, 133-34; Pl. Ex. 69 at 53; DI Ex. 92 at 17.[42] Why incorporate Harbour View and/or Taylor Road into that appendage, both of which were majority white, rather than VTD Thirty-Nine, which was predominantly African-American (and had a BVAP of 56.7%)? See Pl. Ex. 63 at 127-28; DI Ex. 92 at 17. Why not replace Harbour View with VTD Thirty-Seven, which would have raised the appendage's BVAP slightly (to 49.6%)? See Pl. Ex. 63 at 106-07, 124-25, 127-28, 133-34; Pl. Ex. 69 at 53; DI Ex. 92 at 17.[43] Why not extract more BVAP from VTDs

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[42] The majority characterizes the western appendage as adding two predominantly white VTD to reach four largely African-American VTDs. Maj. Op. at 64-65. However, it is clear that this appendage in fact employed two heavily white VTDs to reach two predominantly African-American and two predominantly white VTDs. Pl. Ex. 69 at 53; DI Ex. 92 at 17; DI Ex. 94 at 10.

[43] That move would have raised District 80's population slightly above the limit, but other population could have been ceded elsewhere, such as from VTDs Chrysler Museum and/or One. See Pl. Ex. 69 at 53; Pl. Ex. 71 at 65.

Seven and Nine? See Pl. Ex. 69 at 53; DI Ex. 92 at 17. Why not transfer to District 79 Chrysler Museum, which required a water crossing to connect with District 80 and was heavily white? See Pl. Ex. 69 at 53; DI Ex. 92 at 17. Likewise, why not move to District 79 VTD One, which was predominantly white? See Pl. Ex. 69 at 53; DI Ex. 92 at 17. Additionally, why not move to District 76 VTD Thirty-Two, which was heavily white (and unnecessary to create the western appendage)? See Pl. Ex. 69 at 53; DI Ex. 92 at 17.

These questions indicate that it was profoundly unlikely that the legislature drew District 80's lines predominantly on the basis of race. They reveal that the legislature bypassed several simple avenues available to it to raise District 80's BVAP. And, they undercut the theory that District 80's western appendage was racially motivated, given that the appendage comprised four predominantly white VTDs and two predominantly African-American VTDs and that it avoided incorporating adjacent VTDs with more BVAP.

Moreover, many of these questions indicate the importance of race-neutral motivations in designing District 80. For example, the answer as to why create the western appendage is that doing so benefitted Joannou. 500, 503, 553, 647-49, 651, 655-66. Likewise, the answer to any of the questions that ask, in essence, why not incorporate from District 79 more VTDs from Portsmouth or cede to District 79 more VTDs from elsewhere, is that it would have hurt Joannou. 2nd Trial Tr. at 647-48, 652-53, 655-56. And, the answer as to why not cede VTD Thirty-Two to District 76 is that doing so would have paired James with Jones, and

Jones wished to avoid pairing incumbents (presumably especially himself). See 1st Trial Tr. at 304, 350-51.

In short, the foregoing analysis reveals that District 80 was designed primarily with race-neutral considerations in mind. The record shows that straightforward methods of raising District 80's BVAP were either bypassed or actively sacrificed to race-neutral motives.

6. Input by Delegate James

The majority also rejects Jones' testimony at the first trial that Delegate James, the District 80 incumbent, gave input into the District 80 lines. Maj. Op. at 65-66. However, the only discussion of James' input in Jones' first-trial testimony that the majority cites is the following:

> Q Did Delegate Jones have some significant input into drafting of this district?
>
> A You mean Delegate James?
>
> Q Delegate James, yep.
>
> A Yes, he did.

1st Trial Tr. at 348-49. James' contradiction came years after the fact during the second trial, and I cannot credit it for the reasons explained above. See 2nd Trial Tr. at 71-73. In any event, in light of the foregoing analysis and Jones' detailed explanations of District 80's boundaries, James' belated statement would seem of little relevance.

7. Conclusion as to District 80

In sum, there is significant direct evidence of race-neutral motives for District 80's design. Measured against this evidence, a finding of racial predominance based on the inferences drawn by the majority, I respectfully submit, is in error. Here too, then, I would find that Plaintiffs have not met their burden of proof, considering the record as a whole and the District as a whole. See Pl. Post-Trial Br. at 40-42.

ii. District 89

1. Dr. Palmer's Statistical Evidence

The majority's finding of racial predominance first relies on Dr. Palmer's conclusion that "a census block with a 75% BVAP was 2.9 times more likely to be allocated to District 89 than a census block with only a 25% BVAP." Maj. Op. at 67. However, I do not view that evidence as compelling, given the significant statistical flaws in Dr. Palmer's census block analysis, discussed above, and considering the following discussion. See DI Ex. 101 at 2, 11-12.

2. Changes to District 89's VTDs

The majority next points to the manner in which VTDs were transferred or split as evidence of racial predominance. Maj. Op. at 67-69. For analytical clarity, I will address whole VTD shifts first and then move on to VTD splits.

a. VTD Transfers

The majority highlights the transfer of the heavily African-American Berkley VTD into District 89 from District 80 (which added a water crossing) as a

predicate for a finding of racial motive. Maj. Op. at 68. However, as discussed in the analysis of District 80, Berkley was moved to District 89: (1) to reduce the footprint of District 80 in Norfolk; and (2) because the District 89 incumbent, Alexander, owned a funeral home there. As mentioned in a footnote to that analysis, moreover, Norfolk crossed the river at Berkley, so it is not surprising that the move created a river crossing, and the transfer also fixed a river crossing. Consequently, even if race were considered in transferring Berkley, it was, at best, one of several factors that influenced the decision.[44]

The majority also notes the removal of the "largely white Suburban Park VTD" from District 89. Maj. Op. at 68. It suggests that Suburban Park was removed to make up for the population added by incorporating the Berkley VTD while also altering the District's racial makeup. See Maj. Op. at 68. However, that view comes about because these two VTDs (Suburban Park and Berkley) are considered in a vacuum. Looking at District 89 as a whole, it is clear that the District gained numerous heavily white VTDs: Larchmont Library, Larchmont Recreation Center, and a large

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[44] Plaintiffs claim that: "[w]here the incumbent's a [sic] funeral home was located in a predominantly white VTD [i.e., Suburban Park] . . . it was dropped from the district. Where a funeral home was located in a predominantly black VTD [i.e., Berkley] . . . it was added to the district." Pl. Post-Trial Br. at 44. However, it is unclear whether Jones was aware at the time of redistricting that Alexander's funeral home was located in Suburban Park. See 2nd Trial Tr. at 557-58. Given that ambiguity, I am not willing to ascribe a racial motive to the removal of Suburban Park, let alone a predominant one. And, as explained below, the decision to remove Suburban Park was decidedly non-racial.

portion of Zion Grace. Pl. Ex. 69 at 56; DI Ex. 92 at 19; DI Ex. 94 at 11. Every single one of these VTDs (including the portion of Zion Grace allocated to District 89) had a lower BVAP than Suburban Park, and these VTDs had a combined population of more than double that of Suburban Park. See Pl. Ex. 63 at 121-22; Pl. Ex. 71 at 54.[45] Moreover, these VTDs were added (and Suburban Park swapped out) notwithstanding that "District 89 had the lowest BVAP of any challenged district in the entire South Hampton Roads region." See Maj. Op. at 67. And, several nearby majority-white VTDs, such as the portion of Titustown Center outside District 89, Wesley, and Larrymore all had more BVAP than the added VTDs. See Pl. Ex. 63 at 121-22; Pl. Ex. 71 at 54; Pl. Ex. 69 at 56; DI Ex. 92 at 19; DI Ex. 94 at 11.[46] That record, I submit, does not support a finding that race predominantly animated the transfer of the VTDs on which the majority bases its finding.

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[45] Suburban Park had a population of 3,379, a VAP of 2,768, and a BVAP of 656 (23.7%). See Pl. Ex. 63 at 121-22. In contrast, Larchmont Library had a population of 1,266, a VAP of 944, and a BVAP of 11 (1.2%); Larchmont Recreation Center had a population of 4,016, a VAP of 3,440, and a BVAP of 599 (17.4%); and the District 89 portion of Zion Grace had a population of 1,524, a VAP of ~1,255, and a BVAP of 128 (10.2%). See Pl. Ex. 63 at 121-22; Pl. Ex. 71 at 54.

[46] Wesley had a BVAP of 40.3%, Larrymore had a BVAP of 33.7%, and the District 79 portion of Titustown Center had a BVAP of 28.6%. See Pl. Ex. 63 at 121-22; Pl. Ex. 71 at 54.

b. VTD Splits

I. The VTDs Split Between District 89 & Non-Challenged Districts

The majority additionally observes that, "[i]n two of the three VTDs split between District 89 and a neighboring non-challenged district, the portion of the VTD allocated to District 89 had a higher BVAP than the portion allocated to the non-challenged district." Maj. Op. at 67. The VTDs split between District 89 and non-Challenged Districts include Titustown Center, Zion Grace, and Granby. Pl. Ex. 71 at 54. As to Granby, the majority asserts that the legislature split it "with minute precision" by "adding to District 89 an appendage encompassing significant numbers of black residents, while carving a sliver out of the middle of the Granby VTD to exclude a narrow band of white residents." Maj. Op. at 68-69.

With respect to Titustown Center and Zion Grace, there is very little evidence as to why those VTDs were split. Given that Morgan was the one who split VTDs "in most circumstances," however, we can reasonably conclude that Morgan split these VTDs too, especially given that Plaintiffs, who have the burden, have not shown otherwise. See 2nd Trial Tr. at 714.[47] Because Morgan did not consider race in splitting VTDs, it cannot reasonably be inferred that race played a role in the split of Zion Grace and Titustown Center. 2nd Trial

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[47] There is also direct testimony that Morgan split the Granby VTD, which was in the same geographic area, without Jones' input. 2nd Trial Tr. at 505, 766-67.

Tr. at 668, 714-15. Moreover, although the District 89 portion of Titustown Center incorporated a significant African-American population, Zion Grace was split in such a way as to exclude a largely African-American area and to include mostly white individuals. Pl. Ex. 69 at 56, 58. If the goal were to add BVAP to District 89, what justified that arrangement?

With respect to Granby, there is some complexity in the record. At the first trial, Jones testified that his "recollection" was that he split Granby to comply with a request by Alexander to include one of his funeral homes in his District. 1st Trial Tr. at 345-46. At the second trial, however, Jones clarified that he had been mistaken and that he, in fact, had nothing to do with splitting that VTD. 2nd Trial Tr. at 504-05, 555-58. He indicated that he had confused the funeral home owned by Alexander in the Berkley VTD with another funeral home owned by him in Suburban Park. 2nd Trial Tr. at 504-05, 555-58.[48] Morgan corroborated that Jones was not involved in splitting Granby. 2nd Trial Tr. at 766-67.

Morgan stated that he split the Granby VTD for population equalization purposes and that the odd shape of the split was a function of the underlying census block geography. See 2nd Trial Tr. at 670-71,

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[48] Jones was asked whether he had made the mistake about the funeral home's location at the time of the redistricting or just at the first trial. 2nd Trial Tr. at 557-58. His answer was ambiguous. 2nd Trial Tr. at 557-58. Nevertheless, that is largely irrelevant given that Jones thereafter unequivocally testified that Morgan alone split Granby. 2nd Trial Tr. at 558. And, in any case, making a mistake about the location of the home is hardly proof of a race-based motive.

766-67. With that in mind, and given that Morgan did not rely on racial data in splitting VTDs himself, the record, as a whole, does not support a finding that race was the reason for the Granby split. See 2nd Trial Tr. at 668, 714-15.

Moreover, Granby was split in such a way as to exclude a large African-American population in its northeastern corner (and near the District 89 border). Pl. Ex. 69 at 58. If the Granby split were racially motivated, one must ask why that VTD was split in such a manner? And, the portion of Granby excluded from District 89 had roughly the same population as but more BVAP than the District 89 portion of the Zion Grace VTD. Pl. Ex. 71 at 54.[49] If Morgan were splitting VTDs along racial lines, why did he do so here in a needlessly complex manner that reduced District 89's BVAP? The record therefore points to no racially-based reason for the Granby split.

II. The VTD Split Between District 89 & District 90

Finally, the majority notes that the Brambleton VTD was split between Districts 89 and 90 so as to allow District 89 to achieve 55% BVAP (and that, without this split, District 89 would not have met that target). Maj. Op. at 67-68. However, many VTDs along the District 89/90 border, including Brambleton, were heavily African-American, so any alternative split or

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[49] As noted above, the District 89 portion of Zion Grace had a population of 1,524, a VAP of ~1,255, and a BVAP of 128 (10.2%). See Pl. Ex. 71 at 54. The District 100 portion of Granby had a population of 1,493, a VAP of ~1,222, and a BVAP of 303 (24.8%). See Pl. Ex. 71 at 54.

configuration that resulted in at least 55% BVAP in both Districts would be deemed racially motivated under the majority's reasoning. See Pl. Ex. 69 at 56. And, again, although the split of Brambleton may have been sufficient to achieve 55% BVAP, that precise split was certainly not necessary for District 89 to do so. As noted throughout the discussion of this District, there were numerous options available to the legislature to alter District 89's BVAP (e.g., by incorporating higher-BVAP areas or excluding lower-BVAP areas).[50] In fact, if Larchmont Library, Larchmont Recreation Center, and the District 89 portion of Zion Grace were removed and Suburban Park and Wesley added, Brambleton could have been placed entirely in District 90 without bringing District 89 out of compliance with the 55% BVAP or population equality targets. See Pl. Ex. 63 at 121-22; Pl. Ex. 71 at 54, 56, 65.[51] Moreover, Morgan explained that Brambleton was split to equalize population, that the location of the split was set to equalize population in light of other changes made by the legislature towards the end of the redistricting process, and that there were no other (i.e., racial)

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[50] There are other options that I have not mentioned. For example, the legislature could have split Wesley and included a large African-American population near the District 89 border. See Pl. Ex. 69 at 56. It also could have split Crossroads to incorporate high-BVAP area in the south of that VTD. See Pl. Ex. 69 at 56. Likewise, it could have split Suburban Park to encompass BVAP in the west of that VTD. See Pl. Ex. 69 at 56. And, it could have split Larrymore to include a large African-American population in its northern half. See Pl. Ex. 69 at 56.

[51] The change would have yielded a District 89 population of 79,378, VAP of 60,736, and BVAP of 34,175 (56.3%). See Pl. Ex. 63 at 121-22; Pl. Ex. 71 at 56, 65.

reasons for the location of the split. See 2nd Trial Tr. at 666-67, 763-64. Considering all of this evidence, I cannot find that the split of Brambleton is supportive evidence of racial predominance.

3. Conclusion as to District 89

In sum, Plaintiffs have not carried their burden to prove that race predominated in the design of District 89. See Pl. Post-Trial Br. at 42-44.

iii. District 77

The majority's view as to District 77 is based on several points. I conclude that these points are not sufficient to support a finding of racial predominance.

1. District 77's Benchmark Plan Configuration

The majority's first point to support a finding that race predominated in District 77 is that the District retained its general shape in HB 5005 and, in the benchmark plan: (1) had an odd shape and a low compactness score; and (2) "extracted black residents from Chesapeake, 'divide[d] [black residents] in suburban Portsmouth into two segments so as to share them between Districts 77 and 80,' and extended into Suffolk so that black residents 'on one side of town were separated from whites on the other.'" Maj. Op. at 70 (citations omitted). The majority depends entirely on Dr. Rodden for the second set of points. See Maj. Op. at 70.

As noted throughout this opinion, low compactness or a bizarre shape only matter for our purposes if race was the predominant motive. Bethune-Hill, 137 S. Ct.

at 798. Furthermore, I cannot credit Dr. Rodden's conclusions as to District 77's design in the benchmark plan, for three reasons. First, given my general concerns respecting the credibility of Dr. Rodden's testimony as to the 2011 plan, I certainly cannot find reliable his conclusions as to the 2001 plan. Second, his conclusions as to the benchmark version of District 77 involved both impermissible speculation about legislative motive and advocacy. See Pl. Ex. 69 at 62 ("[District 77 in the benchmark plan] was also already drawn to slice up Chesapeake and pull out African Americans, divide African Americans in suburban Portsmouth into two segments so as to share them between Districts 77 and 80, and stretch all the way to Suffolk, where African Americans on one side of town were separated from whites on the other."). And, third, Dr. Rodden is not qualified to testify to what animated the design of District 77 in 2001.

2. Generalized Population Data & Dr. Palmer's Statistical Evidence

The majority additionally observes that 18,000 people were moved out of and 21,000 people were moved into District 77, notwithstanding the fact that District 77 only needed 3,000 people to satisfy its equal population goal. Maj. Op. at 70. It also highlights Dr. Palmer's finding of a correlation between BVAP and the likelihood that a census block would be assigned to District 77. Maj. Op. at 72. As discussed above, however, numerical population shifts alone are of little help in ascertaining racial predominance here. And, for the reasons discussed earlier in this opinion, I do not find Dr. Palmer's census block evidence persuasive. See DI Ex. 101 at 2, 11-12.

3. Specific Line-Drawing Decisions

The majority then asserts: (1) "four largely white Chesapeake VTDs in District 90 were transferred to District 77, namely, Oaklette, Tanglewood, Indian River, and Norfolk Highlands"; (2) "[t]his removal of white residents from District 90 was necessary for that district to attain a 55% BVAP"; (3) "[t]o compensate for this influx of white residents from District 90, District 77 lost four other majority-white VTDs, namely, Westover, Geneva Park, River Walk, and E.W. Chittum School," which constricted the "already-narrow corridor linking the Chesapeake and Suffolk portions of the district . . . to a half-mile in width" (such that "no east-west roads within District 77 connected the eastern and western parts of the district"); and (4) "District 77 needed to retain the high BVAP Suffolk VTDs of Southside, Hollywood, and White Marsh to achieve a 55% BVAP." Maj. Op. at 70-71. These points, I respectfully submit, do not establish racial predominance, by a preponderance of the evidence, when they are considered along with the race-neutral reasons in the record for the design of District 77.

a. Delegate Spruill's Request for Oaklette, Tanglewood, Indian River & Norfolk Highlands

First, Oaklette, Tanglewood, Indian River, and Norfolk Highlands, which were on the eastern side of District 77, were added at the request of Delegate Spruill: (1) to reunite the old city of South Norfolk ("Old South Norfolk"); and (2) because Spruill lived in the area and wanted his neighborhood to be placed in his District. 2nd Trial Tr. at 497-98, 550; 1st Trial Tr.

at 334-37; DI Ex. 94 at 9.[52] Morgan confirmed that those VTDs were added because Spruill "wanted that portion of Chesapeake in his district." 2nd Trial Tr. at 657. And, moving those (predominantly white) VTDs into District 77 had no impact on District 77's ability to meet its 55% BVAP and equal population targets. See Pl. Ex. 63 at 106-07, 109-10; Pl. Ex. 71 at 65; DI Ex. 38 at 8; DI Ex. 92 at 15.[53]

The majority declines to credit Jones' contention that Spruill requested the VTDs added to the eastern portion of District 77 on the grounds that: (1) Intervenors did not call Spruill to corroborate Jones' testimony; and (2) Old South Norfolk was not reunited because "District 77 lost the low-BVAP Westover VTD, which also had been part of Old South Norfolk." Maj. Op. at 71-72. These points, I respectfully submit, do not support the majority's credibility determination.

As to the first point, the burden to establish racial motive is on Plaintiffs so the failure to call Spruill counts against them, not Intervenors. I therefore credit Jones' explanation because Plaintiffs' evidence does not

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[52] Johnson Park was moved from District 80 to District 77 as part of this same set of requested VTDs. 2nd Trial Tr. at 657; 1st Trial Tr. at 335-37.

[53] It is true that moving Oaklette, Tanglewood, Indian River, and Norfolk Highlands in and E.W. Chittum School, Geneva Park, River Walk, and Westover out raised District 77's BVAP to 58.8% (from 57.7%). See Pl. Ex. 63 at 106-07, 109-10; Pl. Ex. 71 at 65; DI Ex. 38 at 8. But, in either case, District 77 would have had considerable BVAP above the 55% target (and would have met the population target). See Pl. Ex. 63 at 106-07, 109-10; Pl. Ex. 71 at 65; DI Ex. 38 at 8.

undermine it (and because I find Jones to be credible generally). And, Morgan corroborated that Spruill wanted those VTDs. Moreover, logic and common sense support that Spruill would have made these requests; and it is doubtful that the plan would have drawn Spruill's full-throated support had the District not met with his approval. See Pl. Ex. 35 at 141-49.

As to the second point, even if Westover were technically part of Old South Norfolk, that does not affect the conclusion that Jones' goal in moving Oaklette, Tanglewood, Indian River, and Norfolk Highlands was to satisfy Spruill's requests. The majority only relies on Dr. Rodden to support the proposition that the Westover VTD was part of Old South Norfolk and, hence, that reunification did not occur. See Maj. Op. at 72. But, nothing in the record suggests that Spruill specifically requested that Westover be in his District, and Jones affirmatively stated that he believed HB 5005 addressed Spruill's concerns respecting reunification. See 1st Trial Tr. at 334-37.

b. The Needs of District 90 with Respect to Oaklette, Tanglewood, Indian River & Norfolk Highlands

Second, the fact that removing Oaklette, Tanglewood, Norfolk Highlands, and Indian River from District 90 was necessary for it to have 55% BVAP does not establish racial predominance as to District 77. See Maj. Op. at 70. It is evident that race was considered, but the record as a whole shows that race was not the predominant reason. As set forth above, these VTDs were moved largely at the request of Spruill. And, it

was unnecessary to move them into District 77 based on that District's BVAP and population needs. Moreover, if race were predominant, why would not the legislature have moved these predominantly white VTDs into adjacent District 78, which was not subject to the 55% BVAP rule, rather than into District 77, which was? See DI Ex. 94 at 8; DI Ex. 92 at 15.

c. The Removal of Westover, Geneva Park, River Walk & E.W. Chittum School & the Narrowing of the Corridor Between District 77's Eastern & Western Segments

Third, as noted above, the majority also contends that race predominated in District 77 because, in its view, the District lost four largely white VTDs (Westover, Geneva Park, River Walk, and E.W. Chittum School) to compensate for the low-BVAP VTDs added at Spruill's request, which resulted in the eastern and western portions of District 77 being connected by a narrow corridor with no roads. See Maj. Op. at 70-71. As an initial matter, however, there is little information in the record about why those VTDs were removed. And, the majority does not consider the record about possible race-neutral motivations. See Maj. Op. at 70-71. In fact, Jones testified that one of the VTDs transferred out of District 77 was removed because Spruill wanted to draw out a potential opponent. 2nd Trial Tr. at 550 ("[Spruill] had certain requests to move precincts in because they were next to where he lived. He wanted to get rid of a precinct because there was a potential opponent in that

precinct.").[54] And, each of the four removed VTDs leaned Republican in 2009, just like four of the VTDs added at Spruill's request. DI Ex. 92 at 14. To me, then, it is just as likely that these VTDs were removed to compensate for a shift in political composition (due to VTDs gained at the request of a sitting delegate) it is that they were removed to compensate for a shift in racial composition. Thus, I do not believe that the record supports a finding of racial predominance.

d. The Needs of District 89 with Respect to the Removal of Westover, Geneva Park, River Walk & E.W. Chittum School

As to the majority's fourth point, that "District 77 needed to retain the high BVAP Suffolk VTDs of Southside, Hollywood, and White Marsh to achieve a 55% BVAP," that may well be true. See Maj. Op. at 71. But, that does not mean that retaining those VTDs was racially motivated or that, if race played a motivating role, it was a predominant one. Indeed, those VTDs were not changed in HB 5005, and District 77 has remained largely the same for over 20 years; we do not know what motivated the original District lines or the decision to retain them. See 2nd Trial Tr. at 658; DI Ex. 94 at 8.

Moreover, the only changes to the western portion of District 77 were non-racial. Morgan and Jones both showed that the Airport VTD was moved from

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[54] The only VTDs removed from District 77 include Westover, Geneva Park, River Walk, E.W. Chittum School, an unpopulated portion of Georgetown, and Airport. See DI Ex. 94 at 8; Pl. Ex. 69 at 64.

District 77 to District 76 because it preserved District 76's contiguity in light of other changes made to that District and because it was Republican. See 2nd Trial Tr. at 498-99, 658-60. Additionally, Jones testified that the move of that VTD had no "racial implications." 2nd Trial Tr. at 498-99. Likewise, Olde Towne was added to District 77, notwithstanding that it was majority white. See DI Ex. 92 at 15. And, it was transferred into District 77 whole, notwithstanding that it was amenable to a split along racial lines. See Pl. Ex. 69 at 68. Moreover, although Olde Town did have a BVAP of 48.3%, had it been removed and replaced entirely by non-BVAP, District 77 would still have met the 55% BVAP target. See Pl. Ex. 63 at 133-34; Pl. Ex. 71 at 65; DI Ex. 38 at 8.[55] The only other change was the split of Lakeside, which was split by Morgan alone and was therefore race-blind. See 2nd Trial Tr. at 499, 668, 714-15, 770. That conclusion is underscored by the fact that the split of Lakeside failed to incorporate a large African-American population directly adjacent to the District 77 border. Pl. Ex. 69 at 68.

4. VTD Splits

The final point raised by the majority is that, "in both the VTDs split between District 77 and a non-challenged district, the portion allocated to District 77 had a much higher BVAP than the portion assigned to the neighboring non-challenged district." Maj. Op.

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[55] Olde Towne had a population of 1,306, a VAP of 1,025, and a BVAP of 495 (48.3%). See Pl. Ex. 63 at 133-34. If all of Olde Town's population were replaced entirely by voting non-BVAP, District 77's BVAP would be 57.6%. See Pl. Ex. 63 at 133-34; Pl. Ex. 71 at 65; DI Ex. 38 at 8.

at 72. These VTDs include Lakeside and John F. Kennedy. Pl. Ex. 71 at 54. As just noted, however, the record does not support a finding that the Lakeside split was racially motivated. And, the John F. Kennedy split was not changed in HB 5005, so we really know nothing about that split. See 2nd Trial Tr. at 499; DI Ex. 94 at 8.

5. Delegate Spruill's Request that District 77 Meet the 55% BVAP Threshold

There is one additional point, not mentioned by the majority, worth raising here. Jones testified that Spruill requested that his District meet the 55% BVAP target, which he, a leader of the Black Legislative Caucus, felt was important for all the Challenged Districts. See 2nd Trial Tr. at 513-14, 549-51; 1st Trial Tr. at 431. Jones stated that he "drew [Spruill's] district to honor his request in moving the precincts around, and the result of that was to comply [with the request to meet 55% BVAP]." 2nd Trial Tr. at 549-50. He later agreed that he "complied with [Spruill's] request to adjust the boundaries to ensure it had a 55 percent [BVAP]." 2nd Trial Tr. at 550-51. Thus, race certainly played a role in drawing District 77. However, that testimony proves nothing more than that the 55% BVAP rule applied in District 77 and affected its boundaries, which is undisputed as to all the Challenged Districts. It does not provide any insight into how significant the role of race was vis-à-vis other motivations.

6. Conclusion as to District 77

In sum, many of District 77's lines were patently not racially motivated. Others, the record reveals fairly little about. We do have some indication that race played a role in the design of the District, but that is undisputed as to every District and, as the Supreme Court has held, insufficient, on its own, to support a finding of racial predominance. In short, on this record, it is not really possible to make a finding about the role that race played in the construction of District 77 as compared with race-neutral considerations. And, therefore, Plaintiffs have not met their burden to prove, by a preponderance of the evidence, that race was the predominant reason for the design of District 77. See Pl. Post-Trial Br. at 39-41.

iv. District 90

1. Generalized Population Data

The majority first emphasizes the fact that 18,000 people were moved out of District 90, whereas 28,000 were moved into the District. Maj. Op. at 74. Again, that tells us very little. See Bethune-Hill, 141 F. Supp. 3d at 561-62. And, the majority opinion observes that District 90 "improved in compactness in the 2011 plan, and retained the same number of split VTDs." Maj. Op. at 73.

2. VTDs Transferred to District 77

The majority also bases its predominance finding on the four VTDs transferred from District 90 to District 77 (Oaklette, Tanglewood, Indian River, and Norfolk Highlands). Maj. Op. at 74. It maintains that District 90's BVAP would have dropped below 55% had it

retained these VTDs. Maj. Op. at 74. But, as set forth in the discussion of District 77, even if that were true, it is apparent that neutral considerations were heavily involved in the decision to move those VTDs.

3. The Split of the Brambleton VTD

The majority then notes the split of the Brambleton VTD between Districts 89 and 90 and the fact that the split was necessary for District 89 to achieve 55% BVAP. Maj. Op. 74-75. However, as explained in the discussion of District 89, I do not find the Brambleton split to be persuasive evidence of racial predominance.[56]

4. VTDs Split Between District 90 & Non-Challenged Districts

The majority next observes that, among VTDs split between District 90 and non-Challenged Districts, "the portion of the split VTD allocated to District 90 had a higher BVAP than the portion allocated to a neighboring non-challenged district." Maj. Op. at 75. These VTDs include Aragona, Shell, and Reon. Pl. Ex. 71 at 54.

Morgan alone split each of these VTDs in order to equalize population. See 2nd Trial Tr. at 506-07, 664-

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[56] The majority also states that "by transferring 4,000 people from District 90 to District 89, including a portion of Brambleton and a neighboring overwhelmingly black VTD, District 89 gained population with a 94.1% BVAP." Maj. Op. at 74-75. However, as set forth in the discussion of District 89, that District was not particularly constrained by the 55% BVAP target and could have met that target using any number of configurations. The mere transfer of BVAP does not establish racial predominance.

66, 668, 768-70. Accordingly, these splits were race-blind (and Morgan expressly stated that he did not use racial data when splitting Reon or Aragona). See 2nd Trial Tr. at 668, 714-15. Moreover, Morgan explained that Aragona was split early in the process along Witchduck Road, "which is a recognizable major thoroughfare in Virginia Beach" and "an established understandable boundary." 2nd Trial Tr. at 665-66. The Reon split occurred later to again equalize population after other changes were made, and Reon was chosen to be split because the Aragona line was already set and Reon "was one of the VTDs . . . that was added into District 90." 2nd Trial Tr. at 665-66. These splits are thus not probative of racial predominance.

5. Race-Neutral Explanations for Other of District 90's Boundaries

In addition, Morgan provided non-racial explanations for the configuration of District 90 as a whole. First, he testified that the shift of VTDs to District 77 created a variety of population pressures, which were addressed "by getting more population in Norfolk on the north and in Virginia Beach on the east and the south." 2nd Trial Tr. at 660. Consequently, Sherry Park, College Park, Reon, Shell, Davis Corner, and Aragona were added because: "the area of Chesapeake was removed, and District 90 was already in Virginia Beach. So additional population was taken from Virginia Beach." 2nd Trial Tr. at 660.

Second, Morgan attested that District 85 had taken "democratic performing precincts away from District 21" to benefit the District 21 incumbent, Delegate Run Villanueva. 2nd Trial Tr. at 660-61. Hence, Sherry Park, College Park, and Reon, which were Democratic,

were moved from District 85 to District 90 to compensate. 2nd Trial Tr. at 661-62.[57,58]

Third, Morgan described that VTD Barron Black was removed to serve a political purpose. He explained that District 83 had absorbed portions of District 87 (which was entirely moved in HB 5005). See 2nd Trial Tr. at 662; DI Ex. 91 at 173-74. Thus, Delegate Christopher Stolle, a Republican, of District 83 "was getting some new territory, and [Barron Black] was a republican leaning precinct for [his] new district." See 2nd Trial Tr. at 662.[59]

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[57] When describing this political motivation, Morgan erroneously mentioned the VTD Davis Corner as originally having been in District 85. See 2nd Trial Tr. at 661; DI Ex. 91 at 165.

[58] Morgan testified that "[p]olitics had nothing to do with the way [he] split Reon." 2nd Trial Tr. at 770. That testimony was not inconsistent with his explanation for why Reon was added to District 90 in the first place; as set forth above, Reon had been added to District 90 during the redistricting process, and then it was split late in that process to equalize population. See 2nd Trial Tr. at 665-66.

[59] The majority rejects the evidence that District 90's lines were drawn at the request of Delegate Howell, the incumbent. Maj. Op. at 75. Jones testified at the first trial that he received "extensive input" from Howell. 1st Trial Tr. at 339, 343. At the second trial, Howell said that he did not provide such input, although Howell did acknowledge that he and Jones discussed the District after he saw the map. 2nd Trial Tr. at 82-85. I do not credit Howell's testimony in the second trial for the other reasons set forth above.

The input from Howell that Jones described, moreover, was vague and did not offer insights into the construction of any specific District lines. 1st Trial Tr. at 339, 343. Hence, the extent of Howell's input is largely irrelevant.

6. Conclusion as to District 90

On the record taken as a whole, Plaintiffs have not met their burden on District 90 because the record shows that it is just as likely that non-racial factors predominated in drawing the District as it is that race was the predominant factor. See Pl. Post-Trial Br. at 44-45.

V. Conclusion

For the foregoing reasons, I find that Plaintiffs' evidence is insufficient to establish, by a preponderance of the evidence, racial predominance in the drawing of the Challenged Districts. Consequently, I dissent.

/s/
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: June 26, 2018

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:14-cv-852

[Filed June 26, 2018]

GOLDEN BETHUNE-HILL, et al., Plaintiffs,	)
v.	)
VIRGINIA STATE BOARD OF ELECTIONS, et al., Defendants.	)

ORDER

For the reasons set forth in the Memorandum Opinion issued herein (ECF No. 234), it is hereby ORDERED that:

(1) The Commonwealth of Virginia's House of Delegates Districts numbers 63, 69, 70, 71, 74, 77, 80, 89, 90, 92, and 95 ("Challenged Districts"), as drawn under the 2011 Redistricting Plan, Va. Code Ann. § 24.2-304.03, violate the Equal Protection Clause of the United States Constitution;

(2) The Commonwealth of Virginia is hereby enjoined from conducting any elections after this date for the office of Delegate in the Commonwealth's House of Delegates in the Challenged Districts until a new redistricting plan is adopted; and

(3) The matter of providing a redistricting plan to remedy the constitutional violations found in this case is referred to the Virginia General Assembly for exercise of its primary jurisdiction. The Virginia General Assembly should exercise this jurisdiction as expeditiously as possible, but not later than October 30, 2018, by adopting a new redistricting plan that eliminates the constitutional infirmity in the Challenged Districts and reconfigures any other Districts that need to be redrawn to remedy the constitutional infirmity in the Challenged Districts.

It is so ORDERED.

/s/
Barbara Milano Keenan
United States Circuit Judge
For the Court

Richmond, Virginia
Date: June 26, 2018

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:14cv852

[Filed October 22, 2015]

GOLDEN BETHUNE-HILL, Plaintiffs,	)
v.	)
VIRGINIA STATE BOARD OF ELECTIONS, et al., Defendants.	)

MEMORANDUM OPINION

ROBERT E. PAYNE, Senior District Judge:

This case challenges the constitutionality of twelve Virginia House of Delegates districts (the "Challenged Districts") as racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The case is ripe for decision following a four-day bench trial at which the parties presented oral testimony and offered numerous exhibits. Our findings of fact are based on our assessment of the record and are grounded in our determinations respecting the credibility of the witnesses.

Our conclusions of law address the several legal issues presented by the parties. In particular, we have determined that it is the burden of the Plaintiffs to prove by a preponderance of the evidence that race was the predominate factor motivating the decision to place a significant number of voters within or without a particular district in that, as to each of those districts, Virginia's General Assembly subordinated race-neutral districting principles to racial considerations when forming the district. Based on this legal standard and the record, we have concluded that, except as to House District 75, the Plaintiffs have not carried that burden and that race was not shown to have been the predominant factor in the creation of eleven of the twelve Challenged Districts.

We are satisfied that race was the predominant factor in the creation of House District 75. However, we have also concluded that, in using race, the General Assembly was pursuing a compelling state interest, namely, actual compliance with federal antidiscrimination law, and that, in the process, the General Assembly used race in a manner narrowly tailored to achieve that interest.

In the Memorandum Opinion that follows, the Court will review the procedural background of the case in Section I; provide a brief overview of the law relating to racial gerrymandering claims in Section II; and set out its findings on the factual background of the case in Section III. In Section IV, the Court will articulate its understanding of the relevant legal framework for evaluating racial gerrymandering (or "racial sorting") claims, set out additional factual findings of general applicability, and conduct a district-by-district analysis

with district-specific factual findings and district-specific application of the relevant legal framework.

I. PROCEDURAL BACKGROUND

In the wake of the 2010 census, the Virginia General Assembly sought to redraw the legislative districts for the Virginia House of Delegates ("House") and the Senate of Virginia ("Senate"). The task of redistricting is one that carries great political and legal consequence. In a representative democracy, such legislation shapes more than the abstract boundaries of electoral districts; it shapes the character, conduct, and culture of the representatives themselves. On its face, the legislation recites a singularly tedious list of precincts and counties. But in application, few pieces of legislation have a more profound impact on the function of government and whether it acts as "the faithful echo of the voices of the people." Justice James Wilson, The Works of the Honourable James Wilson, L.L.D. 433 (Bird Wilson, ed., The Lorenzo Press 1804).

The political significance of redistricting is matched only by its legal complexity. Those shepherding redistricting legislation must traverse a precarious path between constitutional and statutory demands that are often in tension with one another and provide opaque interpretive standards rather than clear rules.

As to the 2011 redistricting, Delegate Chris Jones led this effort in the House. Delegate Jones played an instrumental role in the 2001 redistricting process and drew upon that experience to lead the 2011 redistricting efforts. Pls.' Ex. 35 at 46:18–48:21; Trial Tr. 272:24-274:7 (Jones). Because Virginia was a covered jurisdiction under Section 4 of the Voting

Rights Act of 1965 ("VRA") at the time the redistricting legislation was prepared, and was therefore subject to the requirements of Section 5 of the VRA,[1] (Docket No. 83), it was necessary to ensure that the plan did not result in a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 125, 141 (1976). In an attempt to comply with this statutory command, Delegate Jones crafted a plan containing twelve majority-minority House Districts ("HDs" or "Districts").[2] These are the Challenged Districts: HDs 63, 69, 70, 71, 74, 75, 77, 80, 89, 90, 92, and 95.

On December 22, 2014, Plaintiffs filed a Complaint against the Virginia State Board of Elections, the Virginia Department of Elections, and various members thereof in their official capacities ("Defendants"), alleging that the Challenged Districts were racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment and seeking declaratory and injunctive relief prohibiting Defendants from implementing or conducting further elections based on the Challenged Districts. (Docket No. 1.)[3] The Plaintiffs are twelve citizens of the United States and the Commonwealth of Virginia who are

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[1] See 52 U.S.C. § 10303(b) (formerly cited as 42 U.S.C. § 1973b (b)).

[2] "Majority-minority" districts are those with a racial or ethnic minority population above 50% of the district's total population.

[3] Plaintiffs filed a Corrected Amended Complaint on June 16, 2015 after one of the original plaintiffs changed residences. (Docket Nos. 66 & 71.)

lawfully registered voters in the Commonwealth and each of whom resides in one of the twelve Challenged Districts. (Docket No. 83.) The Plaintiffs requested that the case be heard by a three-judge district court pursuant to 28 U.S.C. § 2284(a) on the grounds that the action "challeng[es] the constitutionality of the apportionment of . . . [a] statewide legislative body." (Docket No. 1.) That request was granted by the Chief Judge of the United States Court of Appeals for the Fourth Circuit. (Docket No 11.)

The Virginia House of Delegates and the Virginia House of Delegates Speaker William Howell ("Intervenors") moved to intervene in the case. (Docket No. 12.) That motion was granted. (Docket No. 26.)

A four-day bench trial began on July 7, 2015. (Docket Nos. 99-102.) Because the Defendants are "administrative agencies that implement elections" but "do not draw the districts," Trial Tr. 12:14-25 (Defendants), the Defendants allowed the Intervenors to carry the burden of litigation but joined the Intervenors' arguments at the close of the case, id. at 830:2-3. For ease of reference, the Defendants and Intervenors will be referred to as the Intervenors.

II. BASIC OVERVIEW OF RACIAL GERRYMANDERING CLAIMS

Before proceeding to the facts of the case and the substance of this litigation, a brief overview of the constitutional and statutory requirements pertinent to racial gerrymandering claims is appropriate. As noted above, these commands often cut counter to each other and require legislators to balance competing

considerations. Tracing their evolution is therefore useful as a predicate for the decision that follows.

The Supreme Court has long observed that the right to vote is "fundamental" because it is "preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). In Reynolds v. Sims, the Court recognized that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise" and held that the malapportionment of state legislative bodies in derogation of the "one person, one vote" principle violates the Equal Protection Clause. 377 U.S. 533, 555 (1964). Because legislation affecting the right to vote "strike[s] at the heart of representative government," id., the "Constitution leaves no room for classification of people in a way that unnecessarily abridges this right," id. at 560, and grants every citizen "an inalienable right to full and effective participation in the political processes of his State's legislative bodies," id. at 564.

The decision in Reynolds only required state legislatures to comply with the equal population standard, but its language would come to stand for something more. The next year, in Fortson v. Dorsey, the Court suggested that a "constituency apportionment scheme" may not "comport with the dictates of the Equal Protection Clause" if it "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 379 U.S. 433, 438-39 (1965). With Fortson, the Supreme Court first recognized that redistricting legislation may offend Equal Protection Clause

principles when it distinguishes between voters on a racial basis.

Over time, the Supreme Court has come to recognize two types of racial gerrymandering claims under the Fourteenth Amendment: (1) claims of racial vote dilution, where the redistricting legislation is "conceived or operated as [a] purposeful devic[e] to further racial discrimination by minimizing, canceling out or diluting the voting strength of racial elements in the voting population," Rogers v. Lodge, 458 U.S. 613, 617 (1982) (internal quotation marks omitted); and (2) claims of racial sorting, where the redistricting legislation, "though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification," Shaw v. Reno (Shaw I), 509 U.S. 630, 649 (1993).

A. Racial Vote Dilution and the Fourteenth Amendment

The Supreme Court first struck down a districting scheme for unconstitutional racial vote dilution in White v. Regester, 412 U.S. 755 (1973). There, the Court stated:

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question – that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

412 U.S. at 765-66. At the time, it was unclear whether such a claim required a showing of discriminatory intent or could be maintained based solely on discriminatory effect.

Several years later, in City of Mobile v. Bolden, the Court suggested in a plurality opinion that both discriminatory intent and discriminatory effect were required to establish a claim of unconstitutional racial vote dilution. 446 U.S. 55, 66 (1980). That holding was reaffirmed by a majority of the Court in Rogers v. Lodge, 458 U.S. 613 (1982). Writing for the majority, Justice White confirmed that "a showing of discriminatory intent has long been required in all types of equal protection cases charging racial discrimination." Rogers, 458 U.S. at 617.

Therefore, in a constitutional racial vote dilution case, the plaintiff must show that the State has placed a burden upon the right to vote by intentionally establishing or maintaining devices or procedures that cause minority citizens to have less opportunity than other citizens to participate in the political processes and to elect legislators of their choice. This dilutes the minority voter's ability to exercise the "full and effective" right to vote.

B. Racial Sorting and the Fourteenth Amendment

The other strand of "racial gerrymandering" – a racial sorting claim such as the one presented in this case – is "analytically distinct" from a vote dilution claim. Miller v. Johnson, 515 U.S. 900, 911 (1995). "Whereas a vote dilution claim alleges that the State has enacted a . . . purposeful device 'to minimize or

cancel out the voting potential of racial or ethnic minorities,' . . . the essence of [a racial sorting claim] is that the State has used race as a basis for separating voters into districts." Id. (internal citations omitted).

In Shaw I, the Supreme Court faced two patently bizarre legislative districts. 509 U.S. at 635. One resembled a "Rorshach ink-blot test" or a "bug splattered on a windshield," while the other was "even more unusually shaped":

> [The district] is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas until it gobbles in enough enclaves of black neighborhoods. Northbound and southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that "if you drove down the interstate with both car doors open, you'd kill most of the people in the district."

Id. at 635-36 (citations and some internal quotation marks omitted) . Although the text of the legislation was facially neutral, the Court found that "it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles." Id. at 642.

For that reason, rather than requiring the plaintiffs to present evidence of discriminatory purpose and discriminatory effect, the Supreme Court treated the legislation as tantamount to a suspect facial classification and employed strict scrutiny. Id. at 642-43 ("Express racial classifications are immediately suspect because, absent searching judicial inquiry, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. . . . Accordingly, we have held that the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest. These principles apply not only to legislation that contains explicit racial distinctions, but also to those 'rare' statutes that, although race neutral, are, on their face, 'unexplainable on grounds other than race.'") (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977)).

In order to prove a racial sorting claim, a plaintiff must show that the legislature "subordinated" traditional race-neutral districting principles in crafting the district's boundaries:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the

> legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Miller, 515 U.S. at 916 (emphasis added). This threshold standard is "a demanding one." Indeed, the Plaintiffs must overcome a presumption that the legislature acted correctly and in good faith. Id. Thus, the plaintiff "must show that the State has relied on race in substantial disregard of customary and traditional districting practices." Id. at 928 (O'Connor, J., concurring).

If the plaintiff makes the requisite showing, the State must demonstrate that the redistricting legislation is narrowly tailored to advance a compelling state interest. In redistricting cases where the State claims a compelling interest in compliance with the VRA, the legislature must show that it had a "strong basis in evidence" to support its use of race-based districting. Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1274 (2015). In other words, the legislature must have "good reasons to believe" that its use of racial classifications was "required" by the VRA, "even if a court does not find that the actions were necessary for statutory compliance" after the fact. Id. at 1274.

C. The Voting Rights Act

In addition to these constitutional imperatives, redistricting legislation must also comply with the VRA. "The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in

voting[.]" South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) abrogated by Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013). Enacted pursuant to Congress' enforcement powers under the Fifteenth Amendment, see Shelby Cnty., 133 S. Ct. at 2619-21, the VRA prohibits states from adopting plans that would result in vote dilution under Section 2 or – in covered jurisdictions – retrogression under Section 5.[4]

Section 2 of the VRA prohibits the imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color. . . ." 52 U.S.C. § 10301(a). A § 2 violation occurs when, based on the totality of circumstances, the political process results in minority "members hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). By adopting the "discriminatory effect" language from Regester and omitting any requirement to prove discriminatory intent as required by Lodge, Congress created a statutory "results test" that could be brought by plaintiffs who might be otherwise unable to bring a claim of racial vote dilution under the Equal Protection Clause. See Shaw I, 509 U.S. at 641 ("In 1982, [Congress] amended § 2 of the

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[4] In Shelby County, the Supreme Court struck down the coverage formula in Section 4, thereby drawing into question the status of covered jurisdictions' Section 5 compliance obligations until such time that Congress enacts a new coverage formula. 133 S. Ct. at 2631. At the time the redistricting plan at issue was developed and enacted, however, compliance with Section 5 was still a necessary consideration in Virginia's districting process. See Alabama, 135 S. Ct. at 1263.

Voting Rights Act to prohibit legislation that results in the dilution of a minority group's voting strength, regardless of the legislature's intent.").

In order to prove a § 2 violation, a plaintiff must satisfy three prerequisites: compactness, political cohesiveness, and bloc voting. "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." Thornburg v. Gingles, 478 U.S. 30, 50 (1986). "Second, the minority group must be able to show that it is politically cohesive." Id. at 51. "Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate." Id. These final two factors are often referred to collectively as "racial polarization." Once these prerequisites have been satisfied, the court evaluates the plaintiff's evidence based on the totality of the circumstances. The totality of circumstances must be considered with a focus on whether the minority group in question was denied "equal political opportunity." Johnson v. De Grandy, 514 U.S. 997, 1014 (1994).

With respect to redistricting legislation, § 2 establishes a "natural floor" based on the State's demographics for the number of districts wherein members of a minority group must maintain an "equal political opportunity" to "elect representatives of their choice." Where a minority group is sufficiently large and geographically compact to constitute a numerical majority in a hypothetical district, § 2 requires the

creation of a district wherein members of that group maintain the equal ability to elect representatives of their choice. See Bartlett v. Strickland, 556 U.S. 1, 13 (2009). Proving this hypothetical requires the plaintiffs to present an alternative redistricting plan. See Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 480 (1997) ("Because the very concept of vote dilution implies – and, indeed, necessitates – the existence of an 'undiluted' practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice.").

Section 5 of the VRA, on the other hand, forbids voting changes with "any discriminatory purpose" as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, "to elect their preferred candidates of choice." Shelby County, 133 S. Ct. at 2621. Sections 2 and 5 "differ in structure, purpose, and application. Section 5 applies only in certain jurisdictions specified by Congress and 'only to proposed changes in voting procedures.'" Holder v. Hall, 512 U.S. 874, 883 (1994) (quoting Beer, 425 U.S. at 138) (emphasis added).

Section 5 was enacted as "a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." Beer, 425 U.S. at 140. By requiring that proposed changes be approved in advance, Congress sought "'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.'" Id.

(quoting H.R. Rep. No. 94-196, pp. 57-58 (1970)). The purpose of this approach was to ensure that "no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Holder, 512 U.S. at 883.

"Retrogress ion, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan. It also necessarily implies that the jurisdiction's existing plan is the benchmark against which the 'effect' of voting changes is measured." Reno, 520 U.S. at 478. Unlike the "natural floor" of § 2 ensuring equal ability to elect, the retrogression standard of § 5 creates a "relative floor" based upon the existing benchmark plan. Under § 5, the State must ensure that the new plan does not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise" by diminishing the ability of minority voters to elect their preferred candidates of choice as compared to the State's existing plan.

Therein lies the rub.[5] To comply with federal statutory command (the VRA), the State must consider and accoun. for race in drawing legislative districts in order to craft a compliant plan. However, to avoid violating the federal constitution, the State must not subordinate traditional, neutral principles to racial considerations in drawing district boundaries.

And, at the same time, the State must also comply with the "one person, one vote" constitutional

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[5] Apologies to Shakespeare for the misquotation. See William Shakespeare, Hamlet, Act 3, Scene 1, 3:66 ("[A]y, there's the rub.").

requirement as specified in Reynolds v. Sims. That, of course, is not a traditional redistricting principle to be weighed as part of the predominance inquiry, as Alabama makes clear. But it is a federal constitutional requirement that, of necessity, is central to the redistricting process and that is highly instrumental in the drawing of district boundaries.

It is within the context of this legal framework that the Virginia General Assembly sought to design and enact a compliant redistricting plan. And these principles are central to the resolution of this case.

Before proceeding to the facts of the case, the Court feels it necessary to pause and recognize that Delegate Jones, members of the redistricting committee, and other legislators involved in the crafting and amendment of HB 5005 did not have the benefit of either the Supreme Court's guidance in the recent Alabama decision or the guidance provided in the opinion entered here today. Based on the evidence and testimony provided in the record, the Court believes that all of the legislators involved proceeded in a good faith attempt to comply with all relevant constitutional and statutory demands, as they understood them at the time.

III. Factual Background

A. The 2011 Redistricting Process

The first steps in the redistricting process began well before the United States Census Bureau released its population and demographic data. Trial Tr. 273:11 (Jones). On August 23, 2010, Delegate Mark Cole announced that the redistricting subcommittee of the House of Delegates Committee on Privileges and

Elections had scheduled a series of six public hearings throughout the Commonwealth to solicit input into the House redistricting process. (Docket No. 85.) These public hearings were held between September 8, 2010 and December 17, 2010. Id.; Trial Tr. 273:14-19 (Jones). Following these hearings, Governor McDonnell signed Executive Order 31 on January 10, 2011, creating the "Independent Bipartisan Advisory Redistricting Commission" ("Governor's Commission") to develop plan proposals, review public input, and analyze recommendations from other stakeholders in the voting public. (Docket No. 85.)

Redistricting began in earnest in February 2011 when the 2010 census data was released via Public Law 94-171.[6] Trial Tr. 276:4-21 (Jones). On March 25, 2011, the House Committee on Privileges and Elections adopted a resolution setting out the criteria that the committee would follow in reviewing redistricting plans. Pls.' Ex. 48 at 6. The House Committee established six criteria, which were as follows:

> I. Population Equality: The population of legislative districts shall be determined solely according to the enumeration established by the 2010 federal census. The population of each district shall be as nearly equal to the population of every other district as practicable. Population deviations in House of Delegates districts

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[6] The initial data released on February 3, 2011 contained an error. A corrected data set was provided a few weeks later. Trial Tr. 276:4-21 (Jones).

should be within plus-or-minus one percent.

II. Voting Rights Act: Districts shall be drawn in accordance with the laws of the United States and the Commonwealth of Virginia including compliance with protections against the unwarranted retrogression or dilution of racial or ethnic minority voting strength. Nothing in these guidelines shall be construed to require or permit any districting policy or action that is contrary to the United States Constitution or the Voting Rights Act of 1965.

III. Contiguity and Compactness: Districts shall be comprised of contiguous territory including adjoining insular territory. Contiguity by water is sufficient. Districts shall be contiguous and compact in accordance with the Constitution of Virginia as interpreted by the Virginia Supreme Court in the cases of Jamerson v. Womack, 244 Va. 506 (1992) and Wilkins v. West, 264 Va. 447 (2002).

IV. Single-Member Districts: All districts shall be single-member districts.

V. Communities of Interest: Districts shall be based on legislative consideration of the varied factors that can create or contribute to communities of interest. These factors may include, among others, economic factors, social factors, cultural

> factors, geographic factors, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations. . . . Local government jurisdiction and precinct lines may reflect communities of interest to be balanced, but they are entitled to no greater weight as a matter of state policy than other identifiable communities of interest.
>
> VI. Priority: All of the foregoing criteria shall be considered in the districting process, but population equality among districts and compliance with federal and state constitutional requirements and the Voting Rights Act of 1965 shall be given priority in the event of conflict among the criteria. Where the application of any of the foregoing criteria may cause a violation of applicable federal or state law, there may be such deviation from the criteria as is necessary, but no more than is necessary, to avoid such violation.

Pls.' Ex . 16 . These criteria were substantially similar to the criteria adopted by the committee in the 2001 redistricting cycle, with two exceptions. Ints.' Ex. 27. First, the 2001 criteria had permitted a population deviation of "plus-or-minus two percent," rather than one percent, which Delegate Jones stated was altered to better "approximate the one-person-one-vote [standard] in the Virginia constitution." Trial Tr. 275:10-19 (Jones). Second, the 2001 criteria were updated to include a citation to the decision of the

Supreme Court of Virginia in Wilkins v. West as part of the "Contiguity and Compactness" criterion. Id. at 275:13-15.

B. The 55% Black Voting Age Population Floor

At the time the redistricting process began, the twelve Challenged Districts had black voting-age populations ("BVAP") ranging from 46.3% to 62.7%. Three of the districts had BVAPs below 55%. All others were above 55%. Several legislators believed that the twelve "ability-to-elect" districts found in the 2001 redistricting plan (or "Benchmark Plan") needed to contain a BVAP of at least 55% in the 2011 redistricting plan to avoid "unwarranted retrogression" under Section 5 of the VRA and to comply with Criterion II of their own redistricting rules.

The existence of a fixed racial threshold can have profound consequences for the Court's predominance and narrow tailoring inquiries in a racial sorting claim, so a substantial amount of time at trial was devoted to questions related to this factual topic. However, the most important question – whether such a figure was used in drawing the Challenged Districts – was not disputed. Rather, the parties disputed whether the 55% BVAP was an aspiration or a target or a rule. In the end, it is not relevant whether the 55% BVAP was a rule or a target because all the parties agree – and the Court finds – that the 55% BVAP figure was used in structuring the districts and in assessing whether the redistricting plan satisfied constitutional standards

and the VRA, and whether the plan would be precleared by the Department of Justice ("DOJ").[7]

At trial, two additional questions regarding the 55% figure dominated the discussion. First, whether the BVAP figure included or excluded those who identified themselves in the census process as ethnically Hispanic and racially black. And second, what the source of the 55% BVAP figure was.

The parties hotly debated whether the appropriate measure of BVAP used in the redistricting process did or did not include individuals who identified as racially

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[7] Plaintiffs introduced a fair amount of evidence, such as e-mail communications and floor debate, pertaining to HB 5001 rather than HB 5005. For some purposes, such as whether the drafters employed a 55% rule during redistricting, the evidence pertaining to HB 5001 is equally relevant to HB 5005. See Ints.' Ex. 7 at 3-8 ("[MR. ARMSTRONG:] In order for me not to have to go through the extensive dialogue we did here the other day on HB 5001, I would ask the gentleman would . . . his answers to my questions per HB 5001 essentially be applicable to HB 5005? [MR. JONES]: Mr. Speaker, I would say to the gentleman I would believe that will be correct. . . .[MR. ARMSTRONG]: I thank the gentleman for allowing me to streamline the questions."). For other purposes, such as whether the 55% threshold impacted a particular boundary, the evidence pertaining to HB 5001 cannot necessarily be applied to HB 5005. Compare Pls.' Ex. 30 at 1 (e-mail from Delegate McClellan to Richmond Registrar Kirk Showalter regarding HB 5001, stating "[T]he changes we discussed . . . would have pushed the [BVAP] in the 71st District down to 54.8%. The target criteria was 55%, so the change can't be made.") with Ints.' Ex. 7 at 2-3 (floor testimony from Delegate Jones regarding HB 5005, stating, "There was a request made by the registrar of Richmond City working with the gentlewoman from Richmond to make some adjustments to those boundaries, and we did split a precinct in anticipation of moving a polling place this fall for the upcoming elections.").

black and ethnically Hispanic in the census data. The supposed importance of this dispute was that, if black Hispanics were excluded from the black population count, three of the Enacted Plan's majority-minority districts would actually contain a BVAP percentage just shy of 55%. Trial Tr. 280:24-281:10 (Jones); 862:4-7 (Intervenors). That, according to Intervenors, would support a finding that there was not a 55% BVAP floor in deciding on the twelve Challenged Districts.

The record shows that delegates attempting to comply with the 55% BVAP floor submitted their proposed changes using data that included black Hispanics in the BVAP count. See Pls.' Ex. 33 at 46; Trial Tr. 40:10-25 (McClellan); Trial Tr. 68:23-69:2 (Dance); Ints.' Pre-Trial Brief at 8. Although Delegate Jones claimed to personally believe that the DOJ would use a BVAP figure excluding black Hispanics, Trial Tr. 286:8-16 (Jones), this was not a distinction that he discussed with any other delegates, id. at 427:1-428:16 & 490:2-4, and he repeatedly asserted on the House floor that all majority-minority districts in the proposed legislation had a BVAP of 55% or higher, Pls.' Ex. 35 at 42, 66, 108. Moreover, Delegate Jones "assumed" that Virginia, in its preclearance submissions to the DOJ, would represent that all 12 majority-minority districts contained at least 55% BVAP. Trial Tr. 447:6-8 (Jones). This turned out to be the case. Pls.' Ex. 48 at 11 ("All 12 black majority districts were maintained . . . with greater than 55% black VAP – a range of 55.2% to 60.7%.").

At trial, Intervenors relied on a spreadsheet prepared by the Division of Legislative Services ("DLS") in an attempt to show that including Hispanics

in the BVAP count would be erroneous. The spreadsheet contains rows of data by district and, in each column, contains metrics such as total population, population by race, racial population by percentage, population by ethnicity, and ethnic population by percentage. Pls.' Ex. 60 at 13. After adding the racial and ethnic population totals column by column, the Intervenors dramatically revealed that the number exceeded that of the district's total population. Trial Tr. 282:10-286:7 (Jones). But this exercise reflects an error on the part of the Intervenors, not DLS. Because ethnicity measures a different variable than race, the racial and ethnic data are not meant to be added in the first place. If one removes the ethnicity column from the count (on the assumption that Hispanic individuals of any race are already counted in their respective racial columns), then the total population figure is corrected. That does not, however, imply that Hispanics who are racially black should be excluded from the black population count because to do so would undercount the number of black individuals in the BVAP percentage.

The record shows that the ethnic data provided by the census only has redistricting implications in states that may need to craft majority-Hispanic districts or majority-"black-plus-Hispanic" (or "coalition") districts. In states such as Virginia, on the other hand, black Hispanics would count towards the total black population of a district for retrogression purposes. Id. at 747:14-749:12 & 752:17-754:17 (Ansolabehere). That appears to be consistent with the DOJ's (admittedly confusing) guidance on this question: "If there are significant numbers of responses which report Latino and one or more minority races (for example, Latinos

who list their race as Black/African American), those responses will be allocated alternatively to the Latino category and the minority race category." Pls.' Ex. 9 at 4-5 (76 Fed. Reg. Vol. 27 (Feb. 9, 2011) at 7472-7473). This "alternating" approach presumably applies to situations where the district would be majority–"black-plus-Hispanic," in which case counting black Hispanic individuals as either black or Hispanic in alternating fashion would avoid counting those individuals twice in the same district.[8] Trial Tr. 757:1-12 (Ansolabehere). Thus, the Court finds that the proper count includes black Hispanics within the BVAP percentage of each majority-minority district. This method of counting results in a BVAP above 55% for all twelve majority-minority districts, ranging from 55.2% to 60.7%.

Regardless, this debate – like the first – generated more heat than light. The actual differences in BVAP percentages were minute, and both parties eventually agreed that the distinction was not one of great legal significance. See id. at 816:5-9 (Plaintiffs) ("The distinction between how [these are calculate[d] . . . is simply irrelevant, and it doesn't matter what we call it. They used a racial target, and whether that was 53 or 54 or 55 or 56, whether you measure it this way or that way, it just doesn't matter.") and id. at 862:8-11 (Intervenors) ("Do I believe the difference between these two numbers is in reality meaningful in actual reality? No, it isn't a significant difference one way or the other, let's be candid.").

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[8] The Court recognizes that "Hispanic" and "Latino" are not interchangeable designations but has been forced into this unfortunate conflation by the record.

Unlike the first two questions, the answer to the third question – i.e., the source of the 55% rule – can carry great legal significance. Testimony on this question is a muddle. Delegate Dance testified that her understanding came from Delegate Jones and that the 55% figure was necessary in order to achieve DOJ approval, id. at 70:18-23 (Dance), but her speech from the House floor appears to represent it as her own understanding, see Pls.' Ex. 33 at 45 ("[W]e need 55 percent at least voting African-Americans[.]"). Delegate McClellan understood the committee's adopted criteria to require "each of the majority-minority districts . . . to have a black voting-age population of at least 55 percent," Trial Tr. 33:1-4 (McClellan), and testified that she came to this understanding "[t]hrough conversations with Delegate Jones and with Legislative Services," id. at 33:6-8. Delegate Tyler testified that her understanding came from Delegate Spruill, (Docket No. 90-2, Ex. B at 57:5-8), and Delegate Armstrong testified that, "as far as [he] could tell, the number was almost pulled out of thin air," Trial Tr. 98:1-2 (Armstrong).

Delegate Jones initially testified that the figure was drawn from the public hearings held with the community. See id. at 424:1-4 (Jones) (55% BVAP "is what the community had indicated to us that they felt would allow them to elect the candidate of their choice"); id. at 429:8-9 ("That was the testimony that we heard during the public hearings."). Although this testimony is consistent with his prior statements from the House floor, see Pls.' Ex. 35 at 72, the trial record does not support it. At trial, Delegate Jones admitted that he had not read the transcripts from every hearing and could not recall a single instance of a member of the public requesting a 55% BVAP level. Trial Tr.

442:18-443:9 (Jones). Moreover, most of these hearings were transcribed and submitted as evidence. A review of the public hearing transcripts from the Fall of 2010 fails to reveal any mention of the 55% figure. See Pls.' Exs. 3-6, Ints.' Ex. 1.[9]

Delegate Jones also claimed that the 55% figure came from "Delegate Dance, and Delegate Tyler, Delegate Spruill, and one or two othe[r] . . . African-American members of the House." Trial Tr. 431:4-7 (Jones). This was then narrowed to Delegates Dance, Tyler, and Spruill. Id. at 490:5-13. After further questioning, the 55% figure appears to have come from feedback that Delegate Spruill received from various groups in Virginia and from concerns that Delegate Tyler would be unable to hold her seat in HD 75 with a lower BVAP percentage. Id. at 494:6-495:1. In discussing Delegate McClellan's seat, by contrast, Delegate Jones indicated that, while "no one" was comfortable leaving the BVAP percentage in HD 71 at 46%, "they felt that we needed to have a performing majority-minority district, and from the members that I spoke to, they felt that it needed to be north of 50 percent minimum." Id. at 293:6-16 (emphasis added).

Based on the foregoing testimony, and the evidence set forth below, the Court finds – based on the record presented – that the 55% BVAP floor was based largely

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[9] There is, admittedly, one comment made regarding the maintenance of 55 percent voting strength during a public hearing held on April 4, 2011, Pls.' Ex. 31 at 20, but this was the same day that the Joint Committee reported out a substitute for HB 5001, (Docket No. 85 at 3). In other words, the 55% floor was in effect well before this lone comment was offered.

on concerns pertaining to the re-election of Delegate Tyler in HD 75 and on feedback received from Delegate Spruill and, to a lesser extent, Delegates Dance and Tyler. That figure was then applied across the board to all twelve of the Challenged Districts.

C. The Passage and Enactment of HB 5005

During the redistricting process, the General Assembly initially considered three plans: HB 5001, HB 5002, and HB 5003. HB 5001 was the plan designed and proposed by Delegate Jones. HB 5002 and HB 5003, on the other hand, were designed by university students and proposed by other members of the House of Delegates. Id. at 376:24-378:9. According to Delegate Jones, HB 5002 paired somewhere between 40 and 48 incumbents, contained six majority-minority districts, and had over a 9% population deviation. Id. at 378:10-379:4. HB 5003, on the other hand, paired somewhere between 32-34 incumbents, contained nine or ten majority-minority districts, and also did not meet the population deviation criteria. Id. at 379:8-17. The Governor's Commission also designed two plans that contained 13 and 14 majority-minority districts, respectively; however, those plans were never formally introduced or proposed. Id. at 379:18-380:11.

Once the House had coalesced around HB 5001 and the plan was married with the Senate's redistricting plan, the bill was ready for passage and enactment. On April 12, 2011, the Virginia General Assembly passed HB 5001. (Docket No. 83.) Based largely upon objections to the Senate plan, then-Virginia Governor Robert McDonnell vetoed HB 5001 three days later. Ints.' Ex. 10. After relatively minor revisions to the House plan and more substantial revisions to the

Senate plan, Pls.' Ex. 48 at 10, the legislature passed HB 5005, which was signed by the Governor and enacted into law on April 29, 2011, (Docket No. 83).

To comply with its obligations under the VRA, the Commonwealth then submitted the Enacted Plan (or "the Plan") to the DOJ for preclearance. Id. The DOJ precleared the Plan on June 17, 2011, (Docket No. 83), and the first election under the new districts was held on November 8, 2011, (Docket No. 85).

IV. ANALYSIS

The questions raised in a racial sorting claim are deceptive in their simplicity but profound in their implications. Resting at the crossroads of race, politics, and the constitutional limits of federal power, the claim raises vital questions about how we identify as citizens and how we project that identity in the halls of the legislature. The Supreme Court has crafted an interpretive standard for navigating this field: the legislature must not allow racial considerations to predominate over (i.e., to subordinate) traditional redistricting criteria. If this results from attempted compliance with the VRA, the State must show a "strong basis in evidence" that its use of race was necessary to comply with a constitutional reading of the statute.

What this standard provides in conceptual grace, however, it lacks in practical guidance. For legislators, it does little to signal when it may be constitutionally permissible to cut through a precinct or move a boundary line to alter the demographic composition of a district for purposes of complying with similarly mandatory federal law. For litigators, it provides an

enticingly vague standard and invites litigation that can drive up the cost of conducting and defending the State's redistricting endeavor. See Abrams v. Johnson, 521 U.S. 74, 118 (1997) (Stevens, J., dissenting) ("Any redistricting plan will generate potentially injured plaintiffs, . . . [a]nd judges (unable to refer, say, to intent, dilution, shape, or some other limiting principle) will find it difficult to dismiss those claims[.]"). And for courts, it provides an uncomfortable amount of discretion in a field that the Supreme Court has repeatedly admonished "represents a serious intrusion on the most vital of local functions." Miller, 515 U.S. at 915. By asking courts attempting to identify predominance to engage in a searching factual inquiry and comprehensive balancing before applying strict scrutiny – and to justify strict scrutiny – the test gives the judicial branch the relatively broad power to strike down or uphold legislative districts without much guidance in how to do so, notwithstanding exhortations to exercise "extraordinary caution" to the contrary.

Therefore, to sharpen the judicial inquiry, to ensure that the requisite burden is satisfied, and to assess whether redistricting legislation has successfully navigated the narrow passage between constitutional and unconstitutional redistricting, it is appropriate to articulate how the Court understands the predominance and strict scrutiny inquiries are to proceed as a matter of law. The statewide and district-by-district evidence then will be assessed within that framework.

A. The Racial Sorting Framework

The essence of the racial sorting analysis is quite easy to articulate and comprehend. First, courts examine whether racial considerations predominated over – or "subordinated" – traditional redistricting criteria. If a court so finds, then the court applies strict scrutiny. Second, the court examines whether the legislature had a strong basis in evidence for believing federal law required its use of race, assuming this is the basis upon which the State seeks to justify its decision.

But, as this case demonstrates, the devil is in the details. The parties actually have proposed conflicting rules regarding the "subordination" test. And each believes that the Supreme Court's recent Alabama decision reinforces its position. But both cannot be right, and we think that neither is.

The Plaintiffs' case and our colleague's dissent revolve chiefly around the evidence that legislators employed a 55% BVAP floor when crafting the Challenged Districts. According to Plaintiffs' theory, "race predominates if it is the most important criterion." Pls.' Post-Trial Brief at 4 (Docket No. 105). In other words, subordination "does not require open conflict with 'traditional' districting criteria." Id. at 5.

Thus, the Plaintiffs, like the dissent, propose a per se rule: the drafters' use of the 55% BVAP floor in districting is verboten and automatically satisfies Miller's predominance standard. This, the Plaintiffs argue, is the central thrust of the Alabama case:

> This case boils down to a very simple proposition: May Virginia's General Assembly

> utilize a fixed numerical racial threshold in establishing district lines . . . . The answer to this question has been addressed and definitively settled by the United States Supreme Court in its recent Alabama decision which unambiguously condemned the use of racial thresholds in redistricting[.]

Trial Tr. 811:1-10 (Plaintiffs).

Despite its tempting simplicity and visceral appeal, the Court must reject this proposal. Although the Alabama decision condemned the use of unwritten racial thresholds, it did not establish a per se predominance rule. In Alabama, the Court accepted the lower court's finding that legislators had employed BVAP percentage floors in the challenged districts. See Alabama, 135 S. Ct. at 1271 ("The legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible."). If the use of those thresholds constituted predominance per se, then there would have been little reason for the Supreme Court to have remanded the case to the district court to determine whether race predominated. Id. at 1272.

Rather, the Court pointed out that "[t]here [was] considerable evidence that this goal had a direct and significant impact on the drawing of at least some of [the district's] boundaries." Id. at 1271 (emphasis added). "That [the State] expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of

particular lines in multiple districts in the State." Id. at 1267 (emphasis added).

The Alabama case could not be clearer that use of racial BVAP floors constitutes evidence – albeit significant evidence – of predominance. But, we do not read Alabama to hold that use of a BVAP floor satisfies the Plaintiffs' predominance burden merely because the floor was prioritized "above all other districting criteria" in "importance." Rather, the significance of the racial floor is its impact on the creation of the district. This demands "actual conflict between traditional redistricting criteria and race that leads to the subordination of the former, rather than a merely hypothetical conflict that per force results in the conclusion that the traditional criteria have been subordinated to race." Page v. Virginia State Bd. of Elections, No. 3:13CV678, 2015 WL 3604029, at *27 (E.D. Va. 2015) (Payne, J., dissenting).

To understand why this is so, one must remember the origin of – and the rationale for – the Shaw claim. The district boundaries in Shaw were so outlandish that – despite any express textual classification by race in the statute – "it rationally [could] be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles." Shaw I, 509 U.S. at 642. In response, the Court treated the legislation as though it had employed a facial classification and subjected the legislation to strict scrutiny rather than requiring the plaintiffs to prove both discriminatory purpose and discriminatory effect.

In Shaw, the Court compared the districts to racial "balkanization" and "political apartheid" and cautioned that such districts threaten expressive harm – i.e., the

stigmatization of individuals "by reason of their membership in a racial group" and the incitement of "racial hostility" – as well as representative harm – i.e., the threat that elected officials would begin to "believe that their primary obligation is to represent only the members of that group, rather than their constituency as whole." Id. at 657, 643, 648.

Unlike in its racial and political vote dilution cases, however, the Supreme Court did not charge plaintiffs with producing evidence that such discriminatory effects had, in fact, come to pass. See e.g., Rogers, 458 U.S. at 625-27 (observing in racial vote dilution case that "[e]xtensive evidence was cited by the District Court to support its finding that elected officials of Burke County have been unresponsive and insensitive to the needs of the black community, which increases the likelihood that the political process was not equally open to blacks"); Davis v. Bandemer, 478 U.S. 109, 131-32 (1986) (observing in political vote dilution case that "[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district" and that the Court "cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters") (emphasis added). Such evidence is not necessary in a racial sorting claim because "[e]xpress racial classifications are immediately suspect" and are subjected to strict scrutiny. Shaw I, 509 U.S. at 642. This is similarly true for the functional equivalents of express racial classifications: statutes "unexplainable on grounds

other than race" or statutes that are an "obvious pretext for racial discrimination." See id. at 643-44.

No sooner had the ink dried on the Supreme Court's opinion in Shaw, than it was faced with a slightly different question. What if the district's boundaries are not "bizarre" or "irrational," but still reflect a clear manifestation of racial classification? In Miller, the Court recognized that Shaw represented an "analytically distinct" claim, 515 U.S. at 911, but decided that the litigation before it "require[d] [the Court] further to consider the requirements of the proof necessary to sustain this equal protection challenge," id. at 915. Rather than abandoning the claim's animating principles, the Court altered the threshold showing and clarified that parties bringing a racial sorting claim are "neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness." Id.

The district challenged in Miller was not as bizarre as those found in Shaw, but, "when its shape [was] considered in conjunction with its racial and population densities," it became "exceedingly obvious" that the district employed "narrow land bridges" in "a deliberate attempt to bring black populations into the district." Id. at 917. There, the district's various spindly appendages contained nearly 80% of the district's total black population. Id. These facially evident deviations from neutral districting conventions could only be explained on the basis of race. Id. at 918-19.[10] Thus, districts such

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[10] In Miller, the State conceded that "portions of Effingham and Chatham Counties" would not have been added "but for the need

as the one found in Miller still raise the specter of expressive or representative harms and still manifest, on the face of the law, the lawmakers' clear intent to "us[e] race as a basis for separating voters into districts." Id. at 911. Moreover, these districts necessarily reflect the kind of "very stereotypical assumptions the Equal Protection Clause forbids;" namely, the "demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens." Id. at 914.

However, when racial considerations do not entail the compromise of neutral districting norms, the basis for a racial sorting claim evaporates. Traditional, neutral districting principles reflect certain judgments about voters, but these are the same judgments that animate all geographic – as opposed to proportional – representation systems: that those who live near each other in the same communities, counties, and cities have something in common, something that warrants their representation as a reasonably defined geographical – rather than racial or political – unit.

More importantly, holding that otherwise reasonably neutral districts are subject to strict

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to include additional black population;" that "a substantial reason for [the district's precinct splits] was the objective of increasing the black population of that district;" and that the addition of the district itself was "the product of a desire by the General Assembly to create a majority black district". Furthermore, "Georgia's Attorney General objected to the Justice Department's demand for three majority-black districts on the ground that to do so the State would have to 'violate all reasonable standards of compactness and contiguity.'" 515 U.S. at 918-19.

scrutiny because of a merely theoretical or latent conflict between race and traditional districting criteria would unlash the Shaw claim from the mooring of facial classification jurisprudence. If this legal equivalence is forfeited, it is unclear why the "analytically distinct" nature of the claim should not unravel entirely, forcing plaintiffs to prove the expressive or representative harms postulated in Shaw.

Admittedly, the issue presented in this case is a difficult one. The Supreme Court reserved from the very outset the question of whether the intentional use of a 50% BVAP threshold was sufficient to sustain a racial sorting claim:

> It is unnecessary for us to decide whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged. Thus, we express no view as to whether "the intentional creation of majority-minority districts, without more," always gives rise to an equal protection claim.

Shaw I, 509 U.S. at 649. Although the principal opinion in Bush v. Vera attempted to put this question to rest, 517 U.S. 952, 958 (1996) ("Strict scrutiny does not apply . . . to all intentional creation of majority-minority districts.") (principal opinion), Justice Kennedy expressed some doubts in his concurring opinion:

> I join the plurality opinion, but the statements in . . . the opinion that strict scrutiny would not apply to all cases of intentional creation of majority-minority districts require comment. I do not consider these dicta to commit me to any position on the question whether race is

> predominant whenever a State, in redistricting, foreordains that one race be the majority in a certain number of districts or in a certain part of the State.

Id. at 996 (Kennedy, J., concurring) (internal citation omitted).

Based on the Supreme Court's recent decision in Alabama, the Court now appears to be divided, or at least equivocal, on whether BVAP thresholds alone are sufficient to constitute predominance. Compare Alabama, 135 S. Ct. at 1267 (noting that the prioritization of "mechanical racial targets above all other districting criteria" only provides evidence that race predominated) with League of United Latin American Citizens v. Perry (LULAC), 548 U.S. 399, 517 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito) (arguing that the intentional use of a 50% BVAP threshold necessarily means race predominated).

Although the unwritten use of a racial floor by legislators may seem repugnant at first blush, the interpretation of predominance proposed by the Plaintiffs and the dissent has quite serious repercussions.[11] If the use of a BVAP threshold – any

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[11] The dissent contends that we need not grapple with the issues that follow because we are faced with a "more narrow question." See post at 163-64. But incremental ism does not demand that the Court ignore the clear consequences of two different judicial constructions when weighing which to adopt. If one sets us on a path to constitutional conflict and one avoids that path, we think that the latter is to be preferred.

BVAP threshold – is sufficient to trigger strict scrutiny in the absence of a facial manifestation in the lines themselves through the subordination of traditional redistricting principles, then the constitutionality of the Voting Rights Act – as applied to redistricting – would be drawn into question. More fundamentally, the compatibility of the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment's Enforcement Clause might be drawn into question.[13] The Court does not believe that the Constitution – or that Supreme Court precedent – either requires or permits the Plaintiffs' view of predominance and, therefore, does not believe that the racial sorting claim extends any further than its original purpose: to strike down those districts that, on their face, reflect racial classifications.

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[13] "[E]ven if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of th[e] [Supreme] Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect." City of Rome v. United States, 446 U.S. 156, 173 (1980). The ability-to-elect standard, which inherently utilizes racial floors in its redistricting applications, would seem to provide just such a necessary and proper statutory prophylaxis. See id. at 175, 177. No one doubts that redistricting legislation can threaten the right to vote on account of race in defiance of the Fifteenth Amendment's guarantee, see Gomillion v. Lightfoot, 364 U.S. 339, 346-48 (1960), or that the VRA protects against this threat of deprivation, see Allen v. State Board of Elections, 393 U.S. 544, 569 (1969) . And, of course, "no one doubts" that "voting discrimination still exists." Shelby County, 133 S. Ct. at 2619. Therefore, unless the Enforcement Clause is to be read with a rigidity alien to all other positive grants of legislative power, then the use of racial targets by states acting under congressional mandate would not – by itself – seem an appropriate per se trigger for strict scrutiny.

Moreover, the Plaintiffs do not take umbrage at the use of racial targets, so long as those targets serve the ends of preserving minority voters' ability to elect. Quoting from the Alabama decision during their closing statement, the Plaintiffs observed that, in order to be narrowly tailored, the legislature must ask "to what extent must we preserve existing minority percentages in order to maintain the minorities' present ability to elect the candidate of its choice." Trial Tr. 819:23-820:1 (Plaintiffs) (quoting Alabama, 135 S. Ct. at 1274). But, the inquiry into whether the targets are adequately justified only occurs after finding race predominant. If targets themselves constitute subordination, then it is hard to see how the Plaintiffs have not smuggled one inquiry into the next. This would again threaten the foundations of the VRA by making all its redistricting applications subject to strict scrutiny[19] and set up a potential conflict between the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment's Enforcement Clause.

After this journey, we thus arrive back where we started: Miller's predominance test. In Miller, the Court described the Plaintiffs' burden as follows:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the

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[19] Plaintiffs have occasionally flirted with this notion: "The Shaw cases . . . prohibit all unjustified race-based redistricting, whatever form it may take." Pls.' Post-Trial Reply at 6. That said, counsel for Plaintiffs has claimed that there must be a floor of "50 percent plus one" under Section 2 of the VRA. Trial Tr. 842:17-19 (Plaintiffs).

> predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

515 U.S. at 916 (emphasis added). Plaintiffs would prefer we stop reading Miller at this exact punctuation mark. And, under that formulation, they could plausibly argue that they have proved racial predominance merely upon proof that legislators used a 55% BVAP floor. But the very next sentence in Miller leads where this Court must follow: "Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can 'defeat a claim that a district has been gerrymandered on racial lines.'" added). Id. (quoting Shaw I, 509 U.S. at 647) (emphasis added). The Court's quotation of Shaw in this instance rather clearly reflects its intention:

> [T]raditional districting principles such as compactness, contiguity, and respect for political subdivisions . . . are important . . . because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines. . . . Put differently, we believe that reapportionment is one area in which appearances do matter.

Shaw I, 509 U.S. at 647 (emphasis added). Therefore, we rely on the principal opinion in Bush, which stated

that the "neglect of traditional districting criteria" is "necessary, [but] not sufficient" for strict scrutiny to apply. Bush, 517 U.S. at 962 (principal opinion) (emphasis added); accord Miller, 515 U.S. at 928 (O'Connor, J., concurring) ("To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices.").

Our dissenting colleague advocates a different reading of predominance. The dissent views the 55% BVAP floor as a "filter through which all line-drawing decisions had to pass" and argues that this "racial filter necessarily . . . rendered all traditional criteria that otherwise would have been 'race-neutral,' tainted by and subordinated to race." Post at 164. According to the dissent, "a legislative district necessarily is crafted 'because of race'" when such a filter is employed. Post at 167-68 (emphasis added). The dissent takes the view that the "application of strict scrutiny in this suit was never a close question" because when the legislators "intentionally created [55% BVAP] districts," this "was sufficient to show that race was a predominant factor in its redistricting." Bush, 517 U.S. at 999-1000 (Thomas, J., concurring in the judgment). We respectfully decline to adopt this reading of predominance.

First, the dissent's interpretation echoes the view that was rejected by the principal opinion in Bush v. Vera. See id. at 962 (principal opinion). In his separate Bush concurrence, Justice Thomas wrote:

> In my view, [the intentional creation of a 50% BVAP district] means that the legislature affirmatively undertakes to create a majority-

> minority district that would not have existed but for the express use of racial classifications – in other words, that a majority-minority district is created "because of," and not merely "in spite of," racial demographics. When that occurs, traditional race-neutral districting principles are necessarily subordinated (and race necessarily predominates), and the legislature has classified persons on the basis of race. The resulting redistricting must be viewed as a racial gerrymander.

Id. at 1001 (Thomas, J., concurring in the judgment) (internal citations omitted) (emphasis added). Although Justice Thomas recognized that this question was "expressly reserved" in Shaw I, he believed that the Court had "effectively resolved it in subsequent cases." Id. at 999.

Justice Thomas first pointed to the Supreme Court's decision in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), as evidence that "all governmental racial classifications must be strictly scrutinized." Id. at 999-1000. But this presumes what must in fact be proven: that the Virginia legislature's facially neutral redistricting legislation was the legal equivalent of a facially racial classification. Predominance is itself the arbiter of this legal equivalency.

In Adarand, the question was whether a contracting clause providing "financial incentive[s] to hire subcontractors controlled by 'socially and economically disadvantaged individuals' . . . violates the equal protection component of the Fifth Amendment's Due Process Clause." 515 U.S. at 204. In that case, federal law required the use of the clause in most federal

agency contracts, and expressly "require[d] the clause to state that '[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities[.]'" Id. at 205.

The dissent retreads this path by citing to City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). As in Adarand, the Croson Court was faced with a city ordinance expressly requiring contractors to subcontract at least 30% of their work on city contracts to "Minority Business Enterprises" owned and controlled by "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." Croson, 488 U.S. at 477-78.

We have no doubt that strict scrutiny is applied to all express racial classifications, but neither Adarand nor Croson help light our path to interpreting predominance. Adarand itself explicitly disclaimed any application to facially neutral legislation, stating that "this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose." Adarand, 515 U.S. at 213 (emphasis added).

Justice Thomas next pointed to Miller and argued that the State's "concession that it intentionally created [50% BVAP] districts was sufficient to show that race was a predominant, motivating factor in its redistricting." Bush, 517 U.S. at 1000 (Thomas, J., concurring in the judgment). The dissent also relies upon Miller to argue that strict scrutiny is warranted

when a legislature is "motivated by," rather than merely "conscious of," race in its districting. See post at 156. But this demands the impossible. We cannot ask legislators to accidentally wander into compliance with the VRA, and Miller cannot be read to invoke strict scrutiny whenever legislators intentionally create a district with a predetermined BVAP floor.

In Miller, there was considerable evidence showing "that the General Assembly was motivated by a predominant, overriding desire to assign black populations to the Eleventh District and thereby permit the creation of a third majority-black district." 515 U.S. at 917. It was the State's overriding assignment of voters on the basis of race, rather than other districting criteria, that made the third majority-minority district constitutionally offensive. If Miller stood for the proposition that the intentional creation of a 50% BVAP district alone constituted "predominance," then all three majority-minority districts would have constituted racial gerrymanders. Instead, the opinion focused on the Eleventh District, which was a geographic "monstrosity" and required the State to add lengthy appendages, split precincts, and abandon "all reasonable standards of compactness and contiguity." Id. at 909, 917-19.

The Miller decision does, of course, recognize that "statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." 515 U.S. at 913. But it is Miller's subordination test itself that mans the floodgates to ensure that the predominance exception to traditional

facial classification jurisprudence does not swamp the standing rule that Equal Protection Clause claims against facially neutral statutes usually require plaintiffs to prove discriminatory purpose and discriminatory effect.

Subordination in the enacted plan (rather than subordination of hypothetical plans) is required because a map that reflects neutral conventions on its face eliminates the assumption of expressive and representative harm found in Shaw I without necessarily imposing any other constitutionally cognizable harms in its stead. The Supreme Court recognized as much in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

In Bakke, the Supreme Court struck down a higher education admissions program that reserved a specific number of seats for minority applicants. See 438 U.S. at 275. The problem with this scheme was that it "prefer[red] the designated minority groups at the expense of other individuals who [were] totally foreclosed from competition for the 16 special admissions seats[.]" Id. at 305 (opinion of Powell, J.) (emphasis added). As Justice Powell wrote, "[w]hen a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect." Id.

Justice Powell contrasted this holding with the Supreme Court's holding the previous year in United Jewish Organizations v. Carey (UJO), 430 U.S. 144 (1977). In UJO, the State of New York had redrawn its voting districts "to enhance the electoral power of certain 'nonwhite' voters" and "meet [the] objections of the [DOJ] under § 5 of the Voting Rights Act[.]" Bakke,

438 U.S. at 304-05 (opinion of Powell, J.). The Supreme Court affirmed the plan. According to Justice Powell, UJO was distinguishable "as a case in which the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, without excluding individuals belonging to any other group from enjoyment of the relevant opportunity – meaningful participation in the electoral process." Id. at 305 (emphasis added). When a legislature crafts a plan that reflects traditional, neutral, districting conventions and does not intentionally dilute any group's meaningful participation in the electoral process, there is no constitutionally cognizable offense to be found. The use of a quota does not change this. See UJO, 430 U.S. at 162 (principal opinion) ("[A] reapportionment cannot violate the Fourteenth or Fifteenth Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts. Our cases under [Section] 5 stand for at least this much.").[14]

From this vantage, the second problem with the dissent's reading comes into view: an interpretation of predominance that ignores "discriminatory effect" and deploys strict scrutiny when a neutral statute is adopted "because of" race-based motives would allow

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[14] Justice Powell also emphasized that Congress has "special competence . . . to make findings with respect to the effects of identified past discrimination" and special "discretionary authority to take appropriate remedial measures." Bakke, 438 U.S. at 302 n. 41 (opinion of Powell, J.). This too distinguishes the case at hand from those cases wherein a school or municipality, acting on its own impulse, employs a racial quota.

claims to proceed on "racial purpose" alone. Such an interpretation raises vexatious justiciability and balance of powers questions.

A redistricting plan struck down "solely because of the motivations of the men who voted for it" regardless "of its facial content or effect . . . would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons." See Palmer v. Thompson, 403 U.S. 217, 224-25 (1971). That is because the offense is not in the legislative content of the enactment but only in the mental content of the legislators. Although divining the amalgamated motivations of an entire legislature may be tolerable when a showing of discriminatory effect further girds the inquiry, a "purpose only" equal protection claim would require courts to rest judgment upon the thoughts of a coequal branch alone.

We decline to take that path. As Chief Justice Burger once wrote,

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'

United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 127 (1973). The dissent's interpretation

might be a logical step in the evolution of the equal protection "predominance" test. But we think it would be one step too far. Predominance requires that racial considerations manifest in the enacted plan itself through the actual subordination of other districting criteria. That determination cannot be made without examining the respective roles of both race and the other redistricting factors in the actual plan before the Court.

For the foregoing reasons, we reject the invitation to read the unwritten use of a 55% BVAP floor as a per se satisfaction of the predominance inquiry in a racial sorting claim. Of course, evidence of such thresholds is still significant when examining those districts that exhibit deviations from traditional, neutral districting principles. See Easley v. Cromartie (Cromartie II), 532 U.S. 234, 254 (2001) (noting that the use of a 50% racial threshold was "significant" evidence in Bush and Miller); Page, 2015 WL 3604029 at *35 (Payne, J., dissenting) (noting the significance in Shaw v. Hunt (Shaw II), 517 U.S. 899 (1996), of a concession by the State to create two districts with 50% BVAP thresholds). Shaw II, for example, recognized that racial deviations from neutral principles cannot be saved by later resort to non-racial explanations. See 517 U.S. at 907.

According to the dissent, Shaw II compels a finding of predominance whenever non-racial factors are only considered "consistent with the racial objective." Post at 158. But the district at issue in Shaw II was "highly irregular and geographically non-compact by any objective standard that can be conceived." Shaw II, 517 U.S. at 905-06. Simply put, the Shaw II Court was

faced with a situation wherein some "race-neutral" goals – such as partisan balance – could still be partially advanced despite the qualitative predominance of race, but it was not faced with a situation wherein racial districting goals posed no conflict with neutral districting criteria whatsoever.

Moreover, the author of Shaw II, Chief Justice Rehnquist, joined the principal opinion issued the same day in Bush v. Vera, suggesting that these two opinions can – and should – be read in harmony. The Bush opinion joined by Chief Justice Rehnquist explicitly rejected the interpretation that the dissent now attributes to his opinion in Shaw II.

We adopt a reading consistent with Shaw II, as evidenced by our finding of racial predominance in HD 75. A State cannot district predominantly on the basis of race and then insulate such racial line drawing by pointing to other non-racial goals advanced by the racial sort.

Alabama, like its predecessors in the Shaw-Miller line, holds that racial thresholds constitute evidence, not dispositive proof, of racial predominance. If the thresholds employed by the legislators crafting the bill do not manifest in the formation of the enacted district, then there is no facial classification equivalent upon which to rest Shaw's "analytically distinct" framework.

If one strict predominance rule were not enough, Intervenors advance a counter-theory that they claim is derived from Alabama. As the Intervenors stated during their closing argument:

> "[T]he question you must answer to get to strict scrutiny . . . is whether the use of race resulted

> in any district which violated Virginia law or traditional redistricting criteria of the state, or, as the state did here, their specifically adopted criteria."

Trial Tr. 16:8-13 (Intervenors). Intervenors drew the Court's attention to a passage in the Alabama decision where the Court "talk[ed] about [the State] transgressing its own state guidelines, its own state criteria." Id. at 853:15-854:9. And so it did:

> There is considerable evidence that [the racial thresholds] had a direct and significant impact on the drawing of at least some of District 26's boundaries. . . . Transgressing their own redistricting guidelines, the drafters split seven precincts between the majority-black District 26 and the majority-white District 25, with the population in those precincts clearly divided on racial lines.

Alabama, 135 S. Ct. at 1272 (emphasis added). But, as is clear from the cited passage, the drafters' transgression of their own redistricting guidelines – like their informal use of a racial threshold – is evidence of predominance, not dispositive proof. That is because "subordination" is not the same as a "violation" or "transgression." Subordination requires a balancing of degree to determine whether non-racial criteria or racial criteria predominated.

For example, it is difficult to understand what a "transgression" of "compactness" would even entail. Compactness, like temperature, falls along a range, and there is no professional consensus about what degree of departure (from any of more than twenty

measures) is enough to say a district is "not compact." Trial Tr. 716:15-18 (Hofeller).[15]

More importantly, the "traditional" criteria discussed in the Shaw-Miller cases are informed by, but not defined by, state law. Rendering the predominance inquiry subject to state law would make the existence of a federal constitutional claim dependent upon an individual state's resolutions, statutes, or constitution.

The determinative question is not whether a State's individualized districting requirements are "violated," but whether traditional, neutral districting criteria and other districting criteria have been generally "subordinated" to racial considerations on the whole. See Page, 2015 WL 3604029 at *11 ("To show that race predominated, Plaintiffs need not establish that the legislature disregarded every traditional districting principle."). A State's violation of, or departure from, its own stated criteria can constitute evidence in the predominance analysis, but Alabama does not require that the State do so in order to make out a racial sorting claim. Intervenors' proposed interpretation is, accordingly, rejected.

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[15] One of Intervenors' experts, for example, found "no issues" with every last one of the Challenged Districts, Trial Tr. 708:15-709:21 (Hofeller), despite testifying that there is no professional consensus on what is and is not compact. Id. at 716:10-18. Meanwhile, Plaintiffs' expert found some of the districts "not compact" based upon a .20 Reock "rule of thumb," Pls.' Ex. 50 at 18, that other experts disputed as having any meaningful basis, Trial Tr. 716:5-25 (Hofeller).

1. Predominance Analysis

As common courtesy holds, one should not shoot down a suggestion without offering an approach to replace it. Although "predominance," "subordination," "dilution," and "retrogression" are all standards not amenable to hard rules or safe harbors, the Court does have an obligation to the parties to explain its reasoning as clearly and definitively as possible. Therefore, the Court will walk through each of the steps of the analytical framework that it has applied to arrive at its conclusions with respect to the Challenged Districts.

A racial sorting claim is "one area in which appearances do matter." Shaw I, 509 U.S. at 647. Because a district must exhibit "substantial disregard of customary and traditional districting practices" in order to animate the racial sorting doctrine's central concern with facial classification, Miller, 515 U.S. at 928 (O'Connor, J., concurring), the Court will evaluate each Challenged District for "subordination" in three steps.

First, the Court will review the district on the basis of its compliance with traditional, neutral districting criteria, including, but not limited to, compactness, contiguity, nesting, and adherence to boundaries provided by political subdivisions and natural geographic features.

Second, the Court will examine those aspects of the Challenged District that appear to constitute "deviations" from neutral criteria. These may be particular, isolated areas along the district's boundary, or – on occasion – the district itself may seem facially

questionable. Based on the evidence submitted and testimony provided, the Court will examine the record to ascertain the underlying rationale for those deviations. In determining the reasons for deviations from the traditional neutral criteria, it will be necessary to determine whether a deviation was caused in part or entirely by the need to comply with the one-person, one-vote precepts[16] or by political circumstances such as protection of incumbents.

Third, the Court will weigh the totality of the evidence and determine whether racial considerations qualitatively subordinated all other non-racial districting criteria.

a. Neutrality

A racial sorting claim requires the Court find that the State subordinated traditional, neutral criteria, and other non-racial districting criteria to racial considerations. Traditional districting principles include, inter alia, compactness, contiguity, respect for political subdivisions, and communities "defined by actual shared interests." See Miller, 515 U.S. at 916; Shaw I, 509 U.S. at 647. These conventions neutrally advance the values inherent in a geographic – rather than proportional system of representation, such as responsiveness, accountability, familiarity, ease of access, ease of administration, and political engagement.

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[16] Of course, evidence of compliance with equal population goals is not weighed against evidence of racial consideration, but it may be important in determining why a district appears to deviate from neutral criteria.

The specific traditional criteria outlined in Miller and Shaw are not constitutionally required. See Shaw I, 509 U.S. at 647; Gaffney v. Cummings, 412 U.S. 735, 752 n.18 (1973) ("[C]ompactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts."). Rather, these criteria are important because they reflect the neutrality that is central to a redistricting statute that complies with the Equal Protection Clause. See Reynolds, 377 U.S. at 558.[17] Traditional, neutral conventions are important to evaluate in a racial gerrymandering claim "because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." Shaw I, 509 U.S. at 647 (emphasis added).

Of course, states may continue to develop new neutral districting principles, and a State's consistent adherence thereto would also be considered an objective factor to help defeat a claim of gerrymandering. Existing traditional districting conventions "evolved over the years through the political process" itself. Bush, 517 U.S. at 1073 (Souter, J., dissenting). What renders these guiding principles important for redistricting purposes is that they observe and advance neutral democratic values.

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[17] "[T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation . . . . Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment."

The fact that a district deviates from neutral criteria on its face does not, however, mean that those deviations were racially motivated. Other, non-racial districting criteria may also be used to defeat a claim of racial gerrymandering by demonstrating that the district's deviations from neutral criteria are attributable to race-neutral motives. Chief among these are political and incumbency considerations. See Alabama, 135 S. Ct. at 1270.

During the first stage of the predominance inquiry, the Court examines whether the redistricting legislation – on its face – raises questions about the use of discriminatory, individualized criteria (such as race, politics, or incumbency) or whether it appears to be predominantly explainable on the basis of traditional, neutral, geographic criteria (such as compactness, contiguity, or respect for political subdivisions).

In reviewing the Challenged Districts, the Court will consider neutral criteria in the following manner:

i. Compactness

As Justice Stevens stated in Karcher v. Daggett, "geographical compactness serves independent values; it facilitates political organization, electoral campaigning, and constituent representation." 462 U.S. 725, 756 (1983) (Stevens, J., concurring). Although "non-compact" districts may sometimes be necessary to serve these values – such as when a "major transport corridor might . . . minim[ize] travel time for a representative to travel around the district" – "drastic departures from compactness are a signal that something may be amiss." Id. at 758, n.20.

Yet, compactness is surprisingly ethereal given its seemingly universal acceptance as a guiding principle for districting. All of the expert testimony provided reveals one deep conceptual dilemma: no one can agree what it is or, as a result, how to measure it. See, e.g., Trial Tr. 535:19-536:8 (Katz). There are "at least 20" measures, not one of which can claim any greater legitimacy than its peers. Id. at 555:16-17. The Reock test measures geographical dispersion and therefore is sensitive to – and its scoring punishes – elongated districts. Id. at 136:13-23 (Ansolabehere). The Polsby-Popper test measures perimeter dispersion and therefore is sensitive to – and its scoring punishes – oddly shaped district boundaries with large numbers of indentations. Id. Meanwhile, the Schwartzberg test looks at "a normalized standard deviation of the distance from every point to the center of the district," id. at 558:4-7 (Katz), and the Boyce-Clark test measures the "center of inertia" or "how far is the farthest voter from the center of the district," id. at 537:12-538:6. One notable political scientist has quipped that all of these measures are just variants of "the intraocular test": "people look at distric[t] maps, they figure out which districts they think look ugly, and then they choose the compactness measure which comports with their eyeball view of the mapping." Id. at 542:14-24 (Katz). See also id. at 697:20-698:9 (Hofeller) (noting that "the main measurement of compactness . . . while you are drawing a map is to look at the shapes of districts, so-called eyeball test").

But compactness is not important for its own sake. Rather, compactness is important because it serves certain values of geographic representation. Therefore, the "major transportation corridor" district discussed

by Justice Stevens would fare poorly on the Reock metric, but would serve its purposes in a manner that might be reflected by another measure (such as driving time). Meanwhile, a district that adheres to highly irregular county lines, id. at 559:18-21 (Katz); 687:1-4 (Hofeller), or easily identifiable geographic features, id. at 538:14-19 (Katz); 687:1-4 (Hofeller), might score poorly on the Polsby-Popper test, but would enhance the values served by those neutral criteria, as discussed below. If the price of advancing these other neutral criteria is compactness, then the cost is not a judicial concern.

Nor does a district's "absolute" compactness score matter so much as its "relative" score. The Court's examination of a district's compactness measure may be informed by the average in the State (which is important to take account of a State's inalterable features), see Ints.' Ex. 14 at 12 (discussing Virginia's irregular shape, county lines, and geographic features), may be informed by the average in the nation (which is important to take account where a State's own averages may be far above or far below the national average), see Page, 2015 WL 3604029 at *33 ("A highly compact district in a state that adheres closely to compactness principles may be both the least compact in the state and among the most compact in the nation.") (Payne, J., dissenting), and may be informed by historical averages (which is important to account for trends in compactness over several districting cycles), see Trial Tr. 560:2-10 (Katz) (noting it is "perfectly reasonable" to use compactness measures "in comparing two maps for the same state"). These are all factors that courts must consider when evaluating this criterion.

In short, the Court would be remiss to look at compactness scores in a vacuum, but that does not render them useless as evaluative tools in the predominance inquiry. The key is not "absolute" compactness, "relative" compactness, or even a State's adherence to its own constitutional or statutory compactness definitions (although these may be illuminating); rather, the key is whether compactness deviations are attributable to something meaningful, such as other neutral criteria or a legitimate use of non-neutral criteria.[18] As Dr. Hofeller stated at trial, echoing Justice Stevens' sage advice, compactness is "more like a flag than a conclusion." Trial Tr. 684:17-18 (Hofeller).

ii. Contiguity

Contiguity, like compactness, serves important democratic purposes, binding geographic communities together and helping to enable effective representation. In upholding a district under the Virginia constitution's contiguity provision despite its division by water, the Supreme Court of Virginia reflected upon this raison d'être:

> Although the record shows that travel between [some] precincts and the remainder of the district requires travel through another district, there is nothing in this record showing that such access is unreasonable, unduly burdensome, or adversely impacts the ability of residents to

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[18] Virginia's constitutional compactness requirement only demands that districts not be "clearly erroneous, arbitrary, or wholly unwarranted." Wilkins v. West, 264 Va. 447, 465-66 (Va. 2002). That standard informs the Court's inquiry, but does not resolve it.

> secure meaningful representation of their interests or effective communication with their elected representative.

Wilkins v. West, 264 Va. 447, 465-66 (Va. 2002). As the Page court reminded, "contiguity and other traditional districting principles are 'important not because they are constitutionally required,' but rather 'because they are objective factors' courts may consider in assessing racial gerrymandering claims." 2015 WL 3604029 at *11.

A district split by water has not "violated" contiguity for the purposes of a racial sorting claim any more than a district connected by a single point on land has "respected" contiguity. See Shaw I, 509 U.S. at 636 (noting that one of the districts in that case "remain[ed] contiguous only because it intersect[ed] at a single point with two other districts before crossing over them"). As with compactness, contiguity admits of degrees. Districts that are not divided by water are more contiguous than those that are, and districts that are at least connected by a water crossing – such as a bridge – are more contiguous than districts that are not. Land contiguity is important not because it is determinative, but because it reflects the common understanding that bodies of water may mark the natural divide between communities of interest or constitute barriers to the effective function of democratic activities.[19]

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[19] As one Norfolk resident put it during the legislature's public hearings: "Please deep six this specious concept of contiguity by water. To put [these communities] in the same district . . . is patently ridiculous." Pls.' Ex. 3 at 36:8-11.

Of course, deviations from land contiguity may also reflect adherence to other neutral districting criteria. Many cities lie across rivers or around harbors and, indeed, are built outward from the central focal point of the community: the waterfront. In such cases, a body of water that "divides" a community may actually be the primary factor that unites it. In other words, a "deviation" from "contiguity" standards may be an attempt to respect a distinct community of interest or political subdivision. The subordination of contiguity conventions is, like compactness, simply a factor that the Court must consider in conducting its predominance analysis.

iii. Political Subdivisions

A common and significant neutral districting criterion is respect for political subdivisions, such as counties or cities. "Subdivision boundaries tend to remain stable over time. Residents of political units such as townships, cities, and counties often develop a community of interest, particularly when the subdivision plays an important role in the provision of governmental services." Karcher, 462 U.S. at 758 (Stevens, J., concurring). Moreover, adherence to subdivision boundaries can facilitate civic engagement, enhance democratic accountability, and increase administrative convenience. See id. ("[L]egislative districts that do not cross subdivision boundaries are administratively convenient and less likely to confuse the voters."); id. at 787 n.3 (Powell, J., dissenting). As Justice Powell once wrote:

> Most voters know what city and county they live in, but fewer are likely to know what [legislative] district they live in if the districts

> split counties and cities. If a voter knows his [legislative] district, he is more likely to know who his representative is. This presumably would lead to more informed voting. It also is likely to lead to a representative who knows the needs of his district and is more responsive to them.

Id. at 787 n. 3 (Powell, J., dissenting) (internal citations and quotation marks omitted).

When a legislative district is "nothing more than an artificial unit divorced from, and indeed often in conflict with, the various communities established in the State," legislators cannot represent their constituents properly and voters cannot exercise the ballot intelligently. Id. at 787 (Powell, J., dissenting). A report produced by the Governor's Commission distilled the overarching themes that were repeatedly voiced during its public forums from around the Commonwealth. As the Commission noted, "the splitting of municipal and county jurisdictions drew the ire of citizens, who . . . pointed out the difficulties that citizens have in knowing who to contact, who to hold accountable, and who among several legislators should coordinate or lead the representation of local city and county interests in the General Assembly." Pls.' Ex. 23 at 8.

In evaluating whether neutral criteria were subordinated, a legislature's adherence to city and county boundaries provides an important reference point for courts undertaking the predominance analysis. Of course, the legislature may, and often will, need to deviate from political subdivision borders to comply with federal- or state-mandated population

constraints. In such situations, the Court will look to whether another neutral criterion – such as compactness, geographic boundaries, precinct boundaries, or communities of interest – helps to explain the method of departure. In this manner, neutral criteria can often form a "backstop" for one another when one criterion cannot be fully satisfied, thus ensuring that neutral criteria are still predominating in the balance.

iv. Natural Geography

Geographic features, such as mountains ranges or rivers, may also be used to provide a neutral boundary during the districting process. Oftentimes, these geographic indicators mark the boundaries of distinct communities of interest or can provide a point of reference for voters, candidates, and representatives. In many cases, these natural boundaries may already constitute the basis for governmental subdivision lines. See, e.g., Ints.' Ex. 14 at 12 (noting that, in Virginia, "[m] any county lines follow riverbeds, and the State's western boundary runs along 400 miles of mountain ridges and rivers").

Over time, artificial geography may also come to play a similar role. Major transportation thoroughfares may slowly generate distinct communities of interest on either side of the divide, or the marker may be used as a useful reference point for voters, candidates, and representatives seeking to understand their own district's boundaries. These are important factors to consider, especially when adherence to traditional subdivision lines is not possible.

v. Nesting

Nesting refers to the practice of putting two or more districts of the lower chamber of the state legislature wholly within each district of the upper chamber. "By permitting voters readily to identify their voting districts and corresponding representatives, a nested plan can be expected to foster voter participation." Bandemer, 478 U.S. at 179 n.18 (Powell, J., concurring in part, dissenting in part). Nesting may result in a House district boundary that appears inexplicable by neutral criteria until the corresponding Senate district is laid atop.

vi. Precincts

Precincts and Voting Tabulation Districts ("VTDs") are often the smallest objectively identifiable geographic groupings that legislators use to organize legislative districts. They may occasionally correspond to towns, neighborhoods, or other identifiable communities of interest, but they are not "governmental jurisdictions" in their own right. Trial Tr. 234:11-16 (Ansolabehere); 605:4 (Hood). In Virginia, VTDs generally correspond to voting precincts. Id. at 253:14-17 (Ansolabehere).

Given their small size, compliance with precinct or VTD boundaries alone will rarely be sufficient to show adherence to neutral criteria. This is because VTDs can easily be strung together into grotesque formations having little regard for compactness, contiguity, political subdivisions, or other important neutral criteria advancing democratic values. In short, a district could avoid splitting any VTDs but remain highly suspicious on its face.

For these same reasons, however, VTD splits will often provide a flag for further inquiry. The unexplained splitting of several VTDs in a single district can call into question the criteria guiding that district's construction.

vii. Communities of Interest

Among traditional, neutral districting principles, the concept of respecting "communities of interest" is the most enigmatic. On the one hand, respect for such communities is often considered the guiding light of the other neutral principles. On the other hand, defining some "communities of interest" may involve straddling the fence between neutral and discriminatory criteria. For example, communities of interest may be defined by relatively objective factors, such as service delivery areas, media markets, or major transit lines. Similarly, communities may be somewhat objectively characterized as rural, suburban, or urban. These can be valid neutral criteria, assuming that legislators actually have access to this information and rely upon it. See Bush, 517 U.S. at 953 (principal opinion) (discounting argument that legislature relied upon "urban character," "shared media sources," and "major transportation lines" because the "supporting data were largely unavailable to the legislature before the district was created" and the factors did not possess "the same degree of correlation to district lines that racial data exhibit").

The "communities of interest" criterion becomes less neutral, however, when one considers "cultural," "social," or "religious" communities of interest. This tendency to morph into a more individualized metric explains the Miller Court's qualification that

traditional districting principles include "respect for . . . communities defined by actual shared interests." 515 U.S. at 916. To give effect to this elusive delineation, it is important to have demonstrable evidence of shared interest when the boundaries cannot be explained on an objective or neutral basis.

viii. State Criteria

For the reasons discussed above, a plaintiff does not need to prove that a State "violated" its own districting criteria in order to prove predominance. A State's deviation from its own constitutional, statutory, or adopted criteria does, however, constitute evidence that is probative of subordination.

b. Deviations

If the Challenged Districts, or significant parts of the Challenged Districts, appear inexplicable by reference to the consistent application of traditional, neutral principles, then the Court will examine the basis for those departures. Deviations from neutral criteria signal the presence of potential subordination and lay the foundation for the sorting claim; namely, that the districts reflect racial classifications of individual voters and do not constitute neutral, geographic representative units.

The Supreme Court has cited several sources of direct and circumstantial evidence that courts can rely upon in identifying racial deviations, including:

> [S]tatements by legislators indicating that race was a predominant factor in redistricting; evidence that race or percentage of race within a district was the single redistricting criterion

> that could not be compromised; . . . use of land bridges in a deliberate attempt to bring African-American population into a district; and creation of districts that exhibit disregard for city limits, local election precincts, and voting tabulation districts.

Page, 2015 WL 3604029, at *7 (internal citations omitted).

Because traditional, neutral principles advance fundamental democratic values and neutral state interests, districts that substantially disregard these principles can "caus[e] a severe disruption of traditional forms of political activity." Bush, 517 U.S. 974 (principal opinion). In Bush v. Vera, Justice O'Connor described the impact that such districts can have:

> Campaigners seeking to visit their constituents "had to carry a map to identify the district lines, because so often the borders would move from block to block"; voters "did not know the candidates running for office" because they did not know which district they lived in. In light of [the State's] requirement that voting be arranged by precinct, with each precinct representing a community that shares local, state, and federal representatives, it also created administrative headaches for local election officials[.]

Id. at 974. Such complaints have been echoed by local election officials in Virginia who "end up taking the brunt of complaints from voters who can't understand why they can't vote in their old precinct, why they can't

find any of their current office holders on the ballot, and why they are in the same district as a relative who lives nowhere near them[.]" Pls.' Ex. 26 at 17:6-18.

Of course, the presence of identifiable deviations alone does not satisfy the predominance inquiry because "subordination" requires "substantial disregard" for traditional, neutral districting criteria. The substantiality of any identified deviations – and whether it is sufficient to support a finding of predominance – is examined when the Court weighs the evidence as a whole in the final stage.

In reviewing the Challenged Districts, the Court will consider evidence bearing on legislators' bases for the deviations. Deviations may be attributed to any number of considerations, but legislators typically rely upon the following: population equality, race, political affiliation or preference, and incumbency. The Court will evaluate these bases for deviation in the following manner:

i. Population

"[A]n equal population goal . . . is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to how equal population objectives will be met." Alabama, 135 S. Ct. at 1270. Thus, achievement of the population goal is not a traditional redistricting factor that is considered in the balancing that determines predominance. However, the requirement to comply with federally imposed population goals is relevant to assessing why a district may appear to deviate from neutral criteria. This is particularly true where the

census data shows significant losses or gains of population in certain geographic areas of a State.

The Court's analysis does not change just because the State has decided to adopt a lower percentage deviation threshold than constitutionally required. In Alabama, the legislature adopted "a more rigorous deviation standard than our precedents have found necessary under the Constitution." Id. at 1263. There, as here, it seems that "[c]ompliance with these two goals" – BVAP targets and a ±1% population deviation rule – "posed particular difficulties with respect to . . . the State's . . . majority-minority districts[.]" Id. But "legislative efforts to create districts of approximately equal population" more stringent than the 5% deviation held generally permissible in Brown v. Thomson, 462 U.S. 835, 842 (1983), cannot explain away deviations from neutral principles.[20] Id. at 1270. The predominance inquiry examines the basis upon which voters were sorted into appropriately apportioned

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[20] Nor can the fact that a benchmark district possesses "almost exactly the right amount of population," Trial Tr. 147:19-148:19, (Ansolabehere), taken alone, provide evidence that changes to the district were based on race. If adequately populated districts were presumptively required to stay the same, the remaining districts on the map would need to wrap around them in violation of neutral principles. Id. at 688:20-689:10 (Hofeller). Of course, if a district exhibits unexplained deviations from neutral principles and the population changes for that district reflect "remarkable feats" of racial math, then this would constitute strong evidence that race predominated in the drawing of the district boundaries. See Alabama, 135 S. Ct. at 1271 (noting that "[o]f the 15,785 individuals that the new redistricting laws added to the population of [the district], just 36 were white – a remarkable feat given the local demographics").

districts. Id. at 1271. Where apportionment by political subdivision must be sacrificed to equal population goals, for example, other neutral principles such as compactness and precinct boundaries can often pick up the slack. A substantial deviation from neutral principles, therefore, only admits of answer by other, non-neutral criteria, such as race or political affiliation.

ii. Racial Deviations

One explanation for a district's deviations from neutral districting criteria may be voters' race. The mere awareness or consideration of race by legislators in their districting decisions does not, on its own, provide sufficient evidence to support a claim of racial sorting under the Equal Protection Clause. Shaw I, 509 U.S. at 646 ("[T]he legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination."). It takes more than consideration of race to prove that race predominated over traditional factors. Of course, if legislators' use of race entailed the subordination of other districting criteria, it must be adequately justified under the strict scrutiny regime.

iii. Political Deviations

Another explanation for a district's deviations from neutral districting criteria may be voters' political opinions, affiliations, and beliefs. As with race, the mere awareness or consideration of voters' political affiliation by legislators is both unavoidable and constitutionally permissible. Gaffney, 412 U.S. at 753-54 ("It would be idle, we think, to contend that any

political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. . . . The very essence of districting is to produce a different – a more 'politically fair' result. . . . Politics and political considerations are inseparable from districting and apportionment."). Accordingly, districting on the basis of political affiliation may be a legitimate criterion for the legislature to consider. Alabama, 135 S. Ct. at 1270 (citing Bush for the proposition that legislators may rely on "political affiliation" in districting); Bush, 517 U.S. at 964-65 (principal opinion) (citing Gaffney).[21]

The Intervenors have raised the argument that some of the Challenged Districts have political, rather than racial, justifications.[22]

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[21] However, deviations from neutral districting principles on the basis of political affiliation or preference may not always be constitutionally permissible. See Gaffney, 412 U.S. at 754 ("What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment."); LULAC, 548 U.S. at 413-14 (holding that political gerrymandering is unconstitutional); Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015) (reaffirming that "partisan gerrymanders . . . are incompatible with democratic principles" and present justiciable claims) (internal brackets omitted). As in Page, the Plaintiffs have not raised the issue of political gerrymandering, and so this Court need not consider it further. See 2015 WL 3604029 at *20 n.33 (Payne, J., dissenting).

[22] See, e.g., Int's.' Pre-Trial Brief at 18 ("HD95 was crafted carefully to avoid taking HD94's Republican precincts and instead take Democratic-leaning population left behind by HD93 and reach into precincts surrounded by HD93 to dilute Democratic voting strength in that area."); id. at 25 ("The changes on the eastern

iv. Incumbency Deviations

Yet another explanation for a district's deviations from neutral districting criteria may be incumbency considerations. In Gaffney v. Cummings, the Supreme Court observed that: "It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. . . . Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator." 412 U.S. at 753-54. Accordingly, a district's impact on an incumbent may be a legitimate criterion for the legislature to consider. Alabama, 135 S. Ct. at 1270 (citing Bush for the proposition that legislators may consider "incumbency protection" in districting).

However, as with political deviations, deviations from neutral districting principles for incumbency purposes are not always permissible. In Bush, the Court recognized "incumbency protection, at least in the limited form of 'avoiding contests between incumbent[s],' as a legitimate state goal." 517 U.S. at 964-65 (principal opinion) (emphasis added). This state interest "aim[s] at maintaining existing relationships between incumbent congressmen and their constituents and preserv[es] the seniority the members of the State's delegation have achieved in the United States House of Representatives," White v. Weiser, 412 U.S. 783, 792 (1973), but does not necessarily invade

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border to HD75 were drawn to load heavily Republican precincts into the district of Democrat William Barlow (who subsequently lost to a Republican in the 2011 election by 10 percentage points)[.]").

the province of the voters. As the LULAC Court advised: "[I]ncumbency protection can be a legitimate factor in districting, but experience teaches that incumbency protection can take various forms, not all of them in the interests of the constituents." 548 U.S. at 440-41.

Here, the Intervenors allege that many of the Challenged Districts' deviations have "incumbency protection" justifications. See, e.g., Trial Tr. 825:5-7 (Intervenors) ("This was an incumbent-protection plan. That's the predominate motive of this plan[.]"). Some of these deviations reflect an interest in drawing district lines between incumbents' residences to avoiding pairing incumbents. See, e.g., id. at 304:6-21 (Jones). Other deviations, however, reveal an effort to fence in the incumbent's preferred voters or fence out the incumbent's detractors or challengers. See, e.g., id. at 325:19-326:23 (Jones). Whether this latter definition of "incumbency protection" states a legitimate government interest need not be decided here because no one has presented that issue. See Weiser, 412 U.S. at 792.

That said, we share the dissent's concern over Intervenors' "implicit suggestion that approval by incumbent legislators" can somehow "rescue" a plan from a finding of racial predominance. Post at 168. We fully agree that "[t]he [VRA] and the Equal Protection Clause are intended to protect the rights of the individual voter, not to promote the self-interest of incumbents in majority-minority districts." Post at 168. And, to be clear, the framework we adopt today condones no such thing.

For example, if legislators attempt to "'pac[k]' minority voters into a particular majority-minority district for the purpose of protecting the incumbent," post at 169 (emphasis added), this would still constitute racial sorting regardless of the "goal" of incumbency protection, see post at 85-86. This is precisely what we find occurred in HD 75, and we hold that race predominated accordingly. See post at 117-21.

On the other hand, if legislators attempt to pack supporters into their districts or attempt to remove detractors or challengers, then it could hardly be said that race drove the districting deviation. This does not imply that such actions are immune from constitutional challenge. Although the Supreme Court has only sanctioned a state interest in "incumbency pairing prevention," the Plaintiffs simply did not raise any challenge to the Commonwealth's alleged interest in a wider definition of "incumbency protection." Thus, we are in no position to decide that constitutional question.

Simply put, if incumbency interests constitute the predominate criterion driving the construction of the district, then a claim of racial gerrymandering must fail. That, however, does not imply that a claim of political gerrymandering would face a similar fate.

c. Weighing

The final step in the predominance inquiry of a racial sorting claim involves the weighing of the evidence in toto to determine whether the deviations attributable to race "predominate" over all other districting criteria employed by the legislature, including both neutral criteria and deviations

attributable to non-racial motives. To demonstrate predominance, the Plaintiffs must show that the legislature "subordinated" or exhibited "substantial disregard" for these other criteria.

In making its predominance determination, the Court "must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus" and "exercise extraordinary caution." Miller, 515 U.S. at 915-16. "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions," id. at 915, and the Plaintiffs' burden is understandably "a demanding one," id. at 928 (O'Connor, J., concurring). Therefore, the redistricting enactments of a legislature are entitled to a presumption of correctness and good faith, and the burden is upon the plaintiff to dislodge that presumption. Id. at 915 (majority opinion).

It should be noted, however, that the predominance balancing inquiry is qualitative rather than quantitative. In Miller, for example, the challenged district employed gangly arms at various points to capture black population centers, but the district's overall shape was not far from routine. See id. at 917; id. at Appendix B. Looking at the complete picture, however, the district court found that "[r]ace was . . . the predominant, overriding factor explaining the General Assembly's decision to attach to the [district] various appendages containing dense majority-black populations." Id. at 920.

In conducting the predominance balancing, two particular issues warrant the Court's careful attention.

i. Racial & Political Correlation

Occasionally, a deviation may appear equally explainable by racial or political motivations. Because the State is presumed to have acted lawfully and in good faith, the plaintiff must provide evidence that race – rather than politics – represented the primary basis for the classification. Evidence may include the sources of data relied upon in drawing the district, the use of fixed (or "aspirational") political or racial targets or floors, and statements from legislators regarding the relative priority of their racial and political goals.

A political objective, however, does not immunize the use of race as a basis for classification because race cannot be used as a proxy for political characteristics, Bush, 517 U.S. at 968 (principal opinion), even if there is a proven correlation between race and political preference in the state. This is because "to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation." Id.

This is consistent with the Supreme Court's holding in Hunt v. Cromartie (Cromartie I). The lesson of Cromartie I was that a political classification would not be considered racial simply because the Democratic voters happened to be black. 526 U.S. 541, 542 (1999) ("[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if those responsible for drawing the district are conscious of that fact."). The lesson was not that a racial classification would be considered political simply because black voters happened to be Democrats.

In the latter scenario, the State still makes decisions about individuals based on the color of their skin. It is the act of using race as a proxy that constitutes an offensive stereotype. The fact that a stereotype might have some basis in fact – or is relied upon to achieve "non-racial" purposes – does not render it any less offensive.

Evidence of a racial floor will also lend support to the argument that race, rather than politics, can be attributed for particular deviations from neutral principles. Although such a floor will not result in per se predominance where a district is formed predominantly on the basis of neutral criteria, its use can buttress a plaintiff's argument that race was the primary reason for a deviation where race and politics would otherwise seem equally plausible.

Lastly, statements about the relative priority of districting goals may constitute evidence to support a finding of racial predominance. Taken alone, the parroting of federal requirements or the acknowledgment that certain compliance obligations are "mandatory" or "nonnegotiable" does not lend any weight in the predominance balance. If it did, the State would start the predominance balancing at an immediate disadvantage. However, if evidence is provided that demonstrates legislators held a false belief that certain artificial criteria – such as fixed BVAP floor – were necessary to comply with federal law, then statements by those particular legislators regarding compliance are relevant evidence in the predominance inquiry.

ii. Core Retention

Core retention – or "respecting existing district boundaries" – appears to be facially neutral and serves neutral political values, such as increased administrative ease, electoral accountability, and enhanced voter awareness and engagement. Unlike the other neutral criteria identified above, however, core retention holds a special place in the predominance balance. That is because "core preservation . . . is not directly relevant to the origin of the new district inhabitants." Alabama, 135 S. Ct. at 1271. Moreover, core retention may be used to insulate the original basis for the district boundaries.

Thus, where district lines track a path similar to their predecessor districts or where "core retention" seems to predominate, courts should also examine the underlying justification for the original lines or original district. Legislators' use of the core retention principle should certainly receive some degree of deference. But, the inquiry in a racial sorting claim examines the basis upon which voters were placed "within or without a particular district." Miller, 515 U.S. at 916. "That's the way we've always done it" may be a neutral response, but it is not a meaningful answer.

The Court applied the foregoing principles when weighing all of the evidence in the record and in ascertaining whether voters were sorted into a district predominantly on the basis of their race.

2. Strict Scrutiny Analysis

Having applied these precepts to the evidence, we found that the Plaintiffs met their burden to prove that race was predominant in the formation of HD 75,

making it necessary to apply strict scrutiny as to that district. To survive strict scrutiny, the redistricting statute must be narrowly tailored to a compelling state interest. In the redistricting context, this familiar test takes on a somewhat different appearance, which the Court will now examine.

a. Compelling Interest

In prior cases, the Supreme Court has assumed, without deciding, that compliance with federal antidiscrimination laws can constitute a compelling state interest. See Shaw II, 517 U.S. at 915 ("We assume, arguendo, for the purpose of resolving this suit, that compliance with § 2 [of the VRA] could be a compelling interest[.]"); Bush, 517 U.S. at 977 (principal opinion) ("[W]e assume without deciding that compliance with the results test [of the VRA] . . . can be a compelling state interest."). Various members of the Court have also expressed their separate views on the matter. See Bush, 517 U.S. at 990 (O'Connor, J., concurring) ("In my view . . the States have a compelling interest in complying with the results test [of the VRA] as this Court has interpreted it."); LULAC, 548 U.S. at 517 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito) ("I would hold that compliance with § 5 of the Voting Rights Act can be [a compelling state] interest.").

This already complex posture was rendered even less certain by the recent decision in Shelby County. There, the Supreme Court struck down the coverage formula under Section 4 of the VRA, but "issue[d] no holding on § 5 itself[.] 133 S. Ct. at 2631. The Supreme

Court did not help matters in Alabama when it stated, "[W]e do not here decide whether, given Shelby County v. Holder, continued compliance with § 5 remains a compelling interest[.]" 135 S. Ct. at 1274 (internal citation omitted).

Here, the Intervenors claim compelling interests founded on both Section 2 and Section 5 of the VRA. To resolve whether compliance with the VRA was a compelling interest at the time of enactment, the Court finds the rationale offered by Justice Scalia in his LULAC opinion convincing. As to Section 5, Justice Scalia wrote, in a passage joined by Chief Justice Roberts, Justice Thomas, and Justice Alito:

> We long ago upheld the constitutionality of § 5 as a proper exercise of Congress's authority under § 2 of the Fifteenth Amendment to enforce that Amendment's prohibition on the denial or abridgment of the right to vote. If compliance with § 5 were not a compelling state interest, then a State could be placed in the impossible position of having to choose between compliance with § 5 and compliance with the Equal Protection Clause.

548 U.S. at 517 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito) (internal citations omitted). We find this reasoning persuasive, with the proviso that the State's interest must be in actual compliance with the standards articulated in

federal antidiscrimination law as interpreted by the federal courts.[23]

This distinction is an important one. In Miller, the Supreme Court stipulated that "compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." 515 U.S. at 921. That fundamental limitation remains applicable. In drafting redistricting legislation, the State must pass a state law that complies with both federal law and the federal constitution. Thus, the goal of "actual compliance" is clearly compelling. If the State achieves actual compliance with the demands of a federal statute, and the federal statute is itself constitutional, then there can be little doubt that the state law is similarly constitutional.

The State also has an interest in avoiding preclearance denial under Section 5 (or liability under Section 2). This goal of "defensive compliance," however, is not a compelling interest. See, e.g., id. at 921-27. This is because defensive compliance could often entail a violation of constitutional law itself:

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[23] This reasoning is persuasive with respect to Section 2 as well. See Bush, 517 U.S. at 990-92 (O'Connor, J., concurring) (noting that the Supreme Court has repeatedly enforced the obligations of § 2, lower courts have unanimously affirmed its constitutionality, and states would be "trapped between the competing hazards of liability" if § 2 were not a compelling interest). Because only a compelling interest in actual compliance with the non-retrogression standard of Section 5 is necessary to the resolution of this case, however, the Court need not address Section 2 at length.

subordinating traditional, neutral criteria and other districting criteria to racial considerations. See Harris v. Arizona Indep. Redistricting Comm'n, 993 F. Supp. 2d 1042, 1054-55 (D. Ariz. 2014) (noting that "[s]everal aspects of the preclearance process . . . may work together to . . . encourage a state that wants to obtain preclearance to overshoot the mark, particularly if it wants its first submission to be approved").

But Section 5 does not require – and cannot be read to require – states to subordinate traditional, neutral districting principles to race in the redistricting process.[24] The DOJ's own regulations state this explicitly. Pls.' Ex. 9 at 4 (76 Fed. Reg. Vol. 27 (Feb. 9, 2011) at 7472) ("[P]reventing retrogression under Section 5 does not require jurisdictions to violate Shaw v. Reno and related cases."). Therefore, a state that finds itself engaging in predominant racial sorting to fulfill an interest in defensive compliance will begin to forfeit any credible interest in preventing retrogression and may be said to have adopted an interpretation of Section 5 that would itself render Section 5 unconstitutional as applied.[25]

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[24] Nor does Section 2 require states to engage in such behavior. That is because Section 2 requires a plaintiff to first prove that the minority group was "geographically compact" and could have constituted a numerical majority in a hypothetical single-member district. See Shaw II, 517 U.S. at 916; LULAC, 548 U.S. at 433; Bartlett, 556 U.S. at 26.

[25] The conceptual difficulty with the compelling interest arises when the State attempts actual compliance but does not achieve actual compliance. But this is not a dispute about whether the interest is compelling; it is a dispute about whether the State's attempt was "narrowly tailored." If the State's goal was actual

In sum, we hold that Virginia's interest in actual compliance with the standards of federal antidiscrimination law – as the federal courts have interpreted them – was a compelling interest at the time the 2011 redistricting plan was designed and enacted.

Apart from that question, the Court believes that an interest that is compelling at a redistricting plan's inception is capable of sustaining the plan until the next districting cycle. As the district court in Alabama stated, "We evaluate the plans in the light of the legal standard that governed the Legislature when it acted, not based on a later decision of the Supreme Court that exempted [the State] from future coverage under section 5 of the [VRA]." See Alabama Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1307-08 (M.D. Ala. 2013) (three-judge court), vacated and remanded, 135 S. Ct. 1257 (2015). Because the legislature possessed a compelling interest in actual compliance with federal antidiscrimination laws as interpreted by the federal courts at the time the plan was enacted, and because redistricting plans are inherently subject to periodic revision on a reasonable, decennial basis, we conclude that the compelling interest underlying the statute at enactment remains a compelling interest during its effective duration.

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compliance with a proper reading of a constitutional federal standard, then the interest is compelling. Only the federal courts can ascertain whether the State "achieved" actual compliance with a constitutional reading of those statutes, so the State can only "attempt" actual compliance.

b. Narrow Tailoring

The next question in the analytical calculus is whether the State's redistricting statute was "narrowly tailored" to this compelling interest. In particular, the question is whether a State's "attempt" at actual compliance could be viewed as "reasonably necessary under a constitutional reading and application of [federal antidiscrimination] laws." Shaw II, 517 U.S. at 911 (citing Miller, 515 U.S. at 921). In Alabama, the Supreme Court explained that narrow tailoring is satisfied if there is a "strong basis in evidence" for the predominant use of race in drawing a challenged district. 135 S. Ct. at 1274.

The conceptual difficulty for the narrow-tailoring inquiry is this: if a finding of predominance means that race subordinated other considerations, and a constitutional reading of the antidiscrimination standards does not require race to subordinate other considerations, then how can an unconstitutional reading of a federal statute by the State be the interest that saves the State's unconstitutional racial gerrymander? The answer is this: if the disregard for non-racial criteria could have reasonably been viewed as not substantial, and the State shows a strong basis in evidence that its deviations appeared necessary to ensure actual compliance with the federal standard, then the district could still have been considered reasonably necessary under a constitutional reading of the statute.

Therefore, as the finder of fact, we employ a "preponderance" standard during the predominance inquiry, but apply a "sufficiency" standard during the

narrow tailoring inquiry. Justice Breyer's dissent in Abrams v. Johnson makes this rationale clear:

> This legal distinction – between whether a plan really violates § 2 or might well violate § 2 – may seem technical. But it is not. A legal rule that permits legislatures to take account of race only when § 2 really requires them to do so is a rule that shifts the power to redistrict from legislatures to federal courts (for only the latter can say what § 2 really requires). A rule that rests upon a reasonable view of the evidence (i.e., that permits the legislature to use race if it has a "strong basis" for believing it necessary to do so) is a rule that leaves at least a modicum of discretionary (race-related) redistricting authority in the hands of legislators.

521 U.S. at 114 (Breyer, J., dissenting). In Abrams, a federal court was already required to undertake the districting endeavor, so Justice Breyer's dissent was unavailing. Because the lower court decided that it could not create a second majority-black district without subordinating neutral principles, it declined to do so. Id. at 84-85 (majority opinion). This does not mean, however, that a court reviewing a State's plan cannot accept the State's alternate judgment, so long as the legislature had a strong basis for believing its plan was compliant.

Therefore, for predominance, the inquiry is whether, as a matter of fact, the State substantially disregarded non-racial criteria. For narrow tailoring, the inquiry is whether the State had good reason to believe that its actions were required for actual compliance with the non-dilution or non-retrogression

standard. Because substantial disregard of non-racial criteria is not required under a constitutional reading of either standard, this inquiry necessarily entails also asking whether the State had good reason to believe that its own departure from non-racial criteria was not substantial.

Because the standards of the racial sorting claim and the standards of non-dilution and non-retrogression often stand in tension, the Court must recognize that the State is attempting to "toil with the[se] twin demands" and provide a fairway for the State's objectively reasonable efforts. Bush, 517 U.S. at 990 (O'Connor, J., concurring). There may be a variety of plans that reasonably avoid dilution and retrogression and also reasonably respect traditional, neutral districting principles. If the legislature had a strong basis in evidence for its districting decision and reasonable individuals could have come to a different conclusion, then the court should accept that reasonable judgment during the narrow tailoring stage.

Thus, the question a court must ask at the narrow-tailoring stage is whether the legislature has shown that it had "good reasons" to believe – i.e., that it had a strong basis in evidence for believing – that its actions were reasonably necessary to achieve actual compliance with federal antidiscrimination standards based on a constitutional reading of those standards. Or, could a reasonable legislator have come to the conclusion that the challenged district violated neither federal law nor any constitutional limitations upon that federal law.

This formulation also explains why the Plaintiffs and Intervenors proposed seemingly different narrow

tailoring inquiries. Plaintiffs argue that the State "must show that [it] had a 'strong basis in evidence for believing that all of the Challenged Districts needed to meet or exceed a predetermined BVAP target to avoid retrogression." Pls.' Post-Trial Brief at 28. Intervenors argued at trial that the narrow tailoring question is "how much that district violates the state's criteria." Trial Tr. 855:20-21 (Intervenors) (emphasis added). Both of these inquiries are necessary, but neither is sufficient.

The narrow tailoring inquiry asks whether "the legislature ha[d] a 'strong basis in evidence' in support of the (race-based) choice that it has made." Alabama, 135 S. Ct. at 1274.

> This standard . . . does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid. And legislators may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have good reasons to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance.

Id. (emphasis added). With respect to Section 5, for example, this inquiry into whether the "race-based choice" had a "strong basis in evidence" reaches both the standard of retrogression and – because a constitutional interpretation of retrogression does not require subordination – the standard of subordination.

With respect to subordination, the Supreme Court has noted that the extent of a State's disregard of neutral criteria "is not irrelevant to the narrow

tailoring inquiry" when it "exhibit[s] a level of racial manipulation that exceeds what [the VRA] could justify." Bush, 517 U.S. at 980-81 (principal opinion) (emphasis added). Accord Miller, 515 U.S. at 921 ("[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."). In other words, part of showing that a district is narrowly tailored to an interest in actual compliance with a constitutional reading of the retrogression standard entails showing that the district is one that a reasonable legislator could believe entailed only reasonable and minor deviations from neutral districting conventions.

Nor is an inquiry into whether the State possessed a "strong basis in evidence" that its actions were necessary to "prevent retrogression" limited to the BVAP percentages in the Benchmark Plan's existing majority-minority districts. When Congress amended Section 5, it rejected the Supreme Court's decision in Georgia v. Ashcroft, 539 U.S. 461 (2003), and "adopted the views of the dissent." Alabama, 135 S. Ct. at 1273 (citing H.R. Rep. No. 109-478, pp. 68-69, and n. 183 (2006)). The dissent "made clear that courts should not mechanically rely upon numerical percentages but should take account of all significant circumstances." Id. at 1273 (citing Ashcroft, 539 U.S. at 493, 498 (Souter, J., dissenting)). Thus, there can be no argument that retrogression "locks in" the BVAP of each particular district. Ashcroft, 539 U.S. at 498 (Souter, J., dissenting) (noting that the entire Court agrees that "the simple fact of a decrease in [BVAP] in

some districts is not alone dispositive about whether a proposed plan is retrogressive").

The retrogression standard also does not "lock in" a specific number of majority-minority districts. See id. at 492 ("I agree with the Court that reducing the number of majority-minority districts within a State would not necessarily amount to retrogression barring preclearance under § 5 of the Voting Rights Act of 1965."); Texas v. United States, 831 F. Supp. 2d 244, 260 (D.D.C. 2011) ("[T]he Supreme Court . . . has never suggested that the inquiry required by Section 5 can be satisfied by examining only the number of majority-minority districts. In fact, the Court has acknowledged that the inquiry is a complex undertaking."). This holds true not only as a legal principle, but as a matter of logic. Based on demographic changes within the State, it simply may not be feasible to create the same number of majority-minority districts because performing Section 5 districts must also avoid unreasonable deviations from neutral districting criteria. See Miller, 515 U.S. at 910.

A retrogression analysis must "take account of all significant circumstances," Alabama, 135 S. Ct. at 1273, while retaining Section 5's "anchoring reference to electing a candidate of choice," Ashcroft, 529 U.S. at 493 (Souter, J., dissenting). This mandate is now part of the statute itself. See 52 U.S.C. § 10304(b) (prohibiting covered jurisdictions from adopting changes that "ha[ve] the purpose of or will have the effect of diminishing the ability of any [minority] citizens . . . to elect their preferred candidates of choice[.]"). "Clearly, 'ability to elect' is the statutory watchword." Texas, 831 F. Supp. 2d at 260.

Therefore, once a court finds that race predominated, the strong basis in evidence standard asks not only whether the legislature had good reasons for believing the BVAP percentage employed in the district – as well as the district itself – was necessary to avoid retrogression, but also whether the district is one that a reasonable legislator could believe generally respected neutral districting principles. As the Alabama Court reminded: "The standards of § 5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome." 135 S. Ct. at 1273. This applies to reasonable state judgments about subordination as well. In the context of redistricting, the "narrow tailoring" inquiry permits the State to overshoot the bull's-eye, so long as it hits the target.

The foregoing legal framework for analyzing a racial sorting claim provides the guidepost for the statewide and district-by-district findings that follow.

B. Evidence Of General Application To All Districts

"A racial gerrymandering claim applies to the boundaries of individual districts" and must be proven on a "district-by-district" basis. Alabama, 135 S. Ct. at 1265. However, the Plaintiffs provided some evidence that applied across all districts. Therefore, the Court will assess that evidence before proceeding to its district-by-district analysis. Id. ("Voters, of course, can present statewide evidence in order to prove racial gerrymandering in a particular district."). In like fashion, the Commonwealth's evidence may apply

across districts. Our findings on the evidence are based on our credibility determinations and how particular evidence squares with the record as a whole.

First, the Intervenors frequently discussed the substantial population changes experienced on both a statewide level and in the Challenged Districts. See, e.g., Ints.' Post-Trial Brief at 19-20 (Docket No. 104). That evidence has a role to play in the predominance analysis, but it is a limited one.

As the Supreme Court held in Alabama, "an equal population goal is not one factor among others to be weighed against the use of race to determine whether race 'predominates.'" 135 S. Ct. at 1270.[26] Instead, "it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to how equal population objectives will be met." Id.[27]

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[26] The predominance question "concerns which voters the legislature decides to choose[.]" Alabama, 135 S. Ct. at 1271.

[27] That is because, like compliance with the VRA, it is a "demand" that the State does not have the option of ignoring. See Page, 2015 WL 3604029 at *26 (Payne, J., dissenting). "Indeed, in light of the Constitution's demands, that role may often prove 'predominant' in the ordinary sense of that word. But, . . . 'predominance' in the context of a racial gerrymandering claim is special. It is not about whether a legislature believes that [a goal] takes ultimate priority." Alabama, 135 S. Ct. at 1270-71; accord Page, 2015 WL 3604029 at *26 (Payne, J., dissenting) ("[T]here is a difference between a State's 'paramount concern' with complying with federal law and a State's use of [a factor] as a 'predominant criterion' for allocating voters between districts.").

Although the equal population goal is not a traditional factor to be considered in the balance in deciding predominance, its "background" role is nonetheless important in assessing why certain redistricting actions were taken. For example, gains or losses in population affect where in a State new districts must be created or where old districts cannot stand. That, in turn, is pertinent to which neutral redistricting criteria can – or cannot – be fully satisfied.

Second, for the reasons provided in the factual discussion in Section III above, the Court finds that a 55% BVAP floor was employed by Delegate Jones and the other legislators who had a hand in crafting the Challenged Districts. Those delegates believed this necessary to avoid retrogression under federal law, and we do not doubt the sincerity of their belief.[28]

Third, the Plaintiffs' expert, Dr. Stephen Ansolabehere, testified about his analysis of VTDs in the Commonwealth. In particular, Dr. Ansolabehere used statistical models to examine the movement of VTDs into and out of the Challenged Districts and opined whether, in his view, those movements were predominantly "racial" or "political." See id. at 149:19-152:6 (Ansolabehere).

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[28] The dissent believes that Virginia's "one-size-fits-all quota . . .raises even more serious concerns" than the mechanical racial targets in Alabama because the Alabama legislature "sought to maintain preexisting racial percentages specific to each district with the aim of avoiding retrogression[.]" Post at 162-63. But, the legislators in Alabama mistakenly believed that any decrease in existing BVAP percentages would constitute retrogression. Any patina of district-specific treatment was no more than the residue of this misconception.

With respect to Dr. Ansolabehere's analysis regarding race and politics as "predictors" of the likelihood of inclusion of VTDs in one of the Challenged Districts, the Court has both initial technical concerns and more fundamental substantive concerns about the method employed that cause us not to credit his views as to the reasons for VTD placement. First, even though Dr. Ansolabehere's analysis provides a "regional" control to avoid examining VTDs that could not have feasibly found their way into the Challenged Districts, id. at 163:19-25 (Ansolabehere), that does not account for whether a VTD in that region could be considered to "hop" over another VTD in the region en route to the target district in violation of contiguity conventions, see id. at 503:9-504:3 (Katz) and 514:23-515:13 (Katz) (noting that the analysis incorrectly assumes that a VTD "can be independently assigned to a given district" and that "doing [the same analysis] by subregions doesn't solve that problem").[29]

More fundamentally, however, Dr. Ansolabehere's "race versus politics" opinions miss the mark because they do not consider the extent to which the boundaries themselves are justifiable by neutral criteria or any other motivation besides race or political disposition. The models that he employed do not, for example, consider "economic factors, social factors, cultural factors, geographic factors, governmental jurisdictions

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[29] Admittedly, Dr. Katz's approach which includes a variable for distance f rem the center of the target district – is, by his own description, "not a perfect fix" and a sort of "crude or poor approximation." Trial Tr. 504:18-24 (Katz). Nonetheless, it offers a more reliable approach to the issue than Dr. Ansolabehere's analysis.

and service delivery areas." Id. at 230:14-21 (Ansolabehere). If a district is intentionally designed as a performing district for Section 5 purposes, there should be little surprise that the movement of VTDs into or out of the district is correlated – even to a statistically significant degree – with the racial composition of the population. This does not mean, however, that race "predominated" for the purposes of a racial sorting claim.

The predominance question requires an inquiry into whether the movement of VTDs into and out of a district subordinated other criteria in the process. See Backus v. South Carolina, 857 F. Supp. 2d 553, 565 (D.S.C. 2012), sum. aff'd, 133 S. Ct. 156 (2012) . Dr. Ansolabehere' s analysis, for the most part, just does not provide any specific insights into this inquiry. Dr. Ansolabehere's partial correlation analysis, which holds other factors – including party – steady can be considered in determining whether a district's deviations from neutral criteria may be more attributable to race or politics, id. at 157:24-158:5 (Ansolabehere), but it can only be considered in assessing – not refuting – testimony that provides non-racial reasons for particular deviations from neutral principles. Moreover, using Dr. Katz's admittedly crude, but nonetheless reliable, approximation for the limitation that VTDs are not equally susceptible to being included in every district, the statistical significance of the racial justification disappears, at least with respect to the question of whether race or politics is a more significant predicator of VTD placement. See Ints.' Ex. 16 at 21, Table 1; Trial Tr. 505:22-510:25 (Katz) ("Statistically these are a tie.").

On balance, Dr. Ansolabehere' s analysis on the VTD issue is not reliable proof on the predominance issue.

Lastly, the Court finds that some "statewide" compactness information is useful as a point of comparison for the district-by- district analysis set out in Section IV. C. below. In the Challenged Districts, the average Reock score was .320, the average Polsby-Popper Score was .192, and the average Schwartzberg score was 2.365.[30] Pls.' Ex. 51 at 12, Table 2.[31] In the Non-Challenged Districts, the average Reock score was .360, the average Polsby-Popper Score was .243, and the average Schwartzberg score was 2.128. Id. Under the Reock and Polsby-Popper measures, higher scores represent more compact districts. Id. Under the Schwartzberg measure, lower scores represent more compact districts. Id. Of the 100 House districts, seven of the Challenged Districts are in the "bottom 50" – with the lowest Reock scores – and five of the Challenged Districts are in the "top 50" – with the highest Reock scores. Trial Tr. 721:8-12 (Hofeller).

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[30] Dr. Katz utilized a modified Boyce-Clark measure in his analysis. Trial Tr. 537: 2-4 (Katz) . The Court declines to analyze the districts separately using this measure. Dr. Katz appeared to employ the Boyce-Clark measure simply to prove the more academic point that there is no agreed-upon standard and that different measures can lead to different outcomes. Id. at 540:19-542:9 (Katz). This point is not disputed.

[31] None of the experts disputed the compactness calculations provided by the Plaintiffs. However, the Court reiterates that compactness is "more of a flag than a conclusion" and rejects the suggestion by Dr. Ansolabehere that districts under .20 on the Reock scale are presumptively "non-compact." See ante at 57 n.15.

With these generally applicable findings in mind, the Court now advances to the requisite district-by-district analysis. In so doing, the analysis is guided by the legal principles and the framework outlined in Section IV.A. above.

C. District-by-District Analysis

As with the generally applicable factual findings above, our district-by-district analysis itself is a factual one that we have based on our examination of the record as a whole and on our assessment of the credibility of the witnesses.

1. District 63

HD 63 is found in the Dinwiddie-Greensville area and was represented by then-Delegate Rosalyn Dance during the 2011 redistricting process. Under the Benchmark Plan, the district contained all of Dinwiddie and Petersburg City, and part of Chesterfield. Pls.' Ex. 50 at 69, Table 1. Under the Enacted Plan, the district now contains all of Petersburg City and parts of Chesterfield, Dinwiddie, Hopewell, and Prince George. Id. This increased the number of county and city splits from 1 to 4 and increased the number of split VTDs from 0 to 8. Pls.' Ex. 50 at 69-70, Tables 1, 2.[32] HD 63 has a core

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[32] Dr. Ansolabehere and Dr. Hood come to different statewide conclusions regarding the number of VTD splits. See Ints.' Ex. 15 at 6 n.5. This is because Dr. Hood counts the number of VTDs that are split, whereas Dr. Ansolabehere counts the number of splits in VTDs. The latter method accounts for VTDs that are split multiple times. We are not convinced that Dr. Ansolabehere' s approach is entirely sound. See Pls.' Ex. 51 at 15 n.3. But, because Dr. Hood only provides statewide splits data, the Court will rely upon Dr.

retention percentage of 80. 2, Ints.' Ex. 14 at 83, and is contiguous by land.

On its face, the district is unusually shaped. After chopping Dinwiddie County in half, the southern border of the district tends to follow precinct boundaries from west to east until it cuts through Dinwiddie precinct along Interstate 85. After that, the district line constricts, carving out a hook around New Hope. After a brief return to a rather normal configuration around Petersburg City, the district narrows to avoid the Jefferson Park area and the homes of Delegates Cox and Ingram. It then continues in a narrow form through Prince George, into various parts of Hopewell, and terminates at the James River. See Pls.' Ex. 66 at 1; Ints.' Ex. 94 at 1.

The district had Reock and Polsby-Popper scores of .61 and .48 under the Benchmark Plan and experienced a steep drop to scores of .25 and .16 under the Enacted Plan. Ints.' Ex. 15 at 15, Table 9. This marks the largest Reock compactness reduction of any district in the Enacted Plan. Trial Tr. 140:7-9 (Ansolabehere). The district's Schwartzberg score is 2.506. Pls.' Ex. 51 at 11, Table 1.

The district's deviations from neutral redistricting criteria begin with the splitting of Dinwiddie County. This split appears to be avowedly racial. Delegate Dance testified that the southern half of Dinwiddie "went to Delegate Tyler to try to get her number

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Ansolabehere' s district-by-district splits data, thereby giving Plaintiffs the benefit of the doubt. The Court expresses no opinion regarding the appropriate counting measure.

. . . [o]f African-American voters up to 55 percent." Trial Tr. 80:11-17 (Dance). Within this deviation are two sub-deviations: (1) the splitting of Dinwiddie precinct; and (2) the hook that wraps around New Hope precinct.

The Dinwiddie precinct is split along I-85, but this is not listed among the redistricting criteria, which undermines its explanatory value as a districting criterion. See Alabama, 135 S. Ct. at 1271-72. Although established transit corridors may split areas into "communities of interest" over time, there was no evidence that this precinct is comprised of distinct communities on either side of the highway. On the other hand, the artificial border provided by I-85 may provide a clear boundary to voters and candidates alike that reside in Dinwiddie precinct and wish to know their House district. In the absence of any further explanation by the Intervenors or the Plaintiffs, however, the Court declines to identify any particular rationale for this "sub-deviation," meaning that the Plaintiffs have not carried their burden of attributing it to race.

The other "sub-deviation" – the hook around New Hope – is decidedly not racial. After reviewing the evidence, the Court finds that the purpose for this deviation was "challenger prevention" and "incumbency protection." This deviation was negotiated between Delegates Dance, Tyler, and Jones. Trial Tr. 325: 24-25 (Jones). Delegate Jones testified that the cutout accounted for "the bulk of the splits in [the 75th] district," id. at 326:18-19, that New Hope was retained in HD 63 because "a tremendous amount of [Delegate Dance's] employees or constituents had family" there,

id. at 326:5-10, and that Delegate Dance had "a potential primary opponent she wanted to draw out of her district," id. at 326:11-12; accord id. at 858:4-7 (Intervenors); Ints.' Pre-Trial Brief at 20. So, if it looks like the hook is reaching for something, that's because it is: a potential threat to the incumbent.

Thus, at this point the record is that one reason for the configuration of HD 63 was racial and one reason was purely political.

The other component of HD 63' s unusual shape is its reach north and east from U.S. 460 to the James River in a way that runs through both Prince George County and the City of Hopewell. In so doing, this component of HD 63 increases the number of localities in the district from three to five, and it also splits a number of VTDs. Trial Tr. 140:16 (Ansolabehere); id. at 79:23-80:3 (Dance). According to Delegate Dance's testimony, "that's what it took to get [Delegate Tyler] to the 55 percent strength of African-American voters." Id. at 81:15-18 (Dance). Not only did this help satisfy the 55% threshold in District 75, it also helped maintain a substantial African-American population in District 63. Delegate Dance "picked up parts of Prince George . . . to get more African-Americans . . . [a]nd then . . . picked up the concentration of African-Americans in Hopewell[.]" Id. at 81:21-83:6 (Dance).

However, the record shows that the eastern border advanced other criteria, both neutral and political. In order to unwind the water crossing in the Benchmark HD 74, Delegate Jones decided to move precincts in Hopewell City out of HD 74 and into HD 63. Thus, HD 63's eastern configuration improved HD 74's adherence to contiguity conventions. See Wilkins, 264 Va. at 465

(examining whether HD 74's water continuity was permissible under the Constitution of Virginia). Moreover, by placing these precincts in HD 63 rather than HD 62 or HD 64, the District's eastern boundary avoids solving the water crossing problem to the detriment of Republican districts on either side. See Ints.' Ex. 92 at 2. Thus, it appears that this aspect of HD 63's unusual shape can be explained on a neutral, racial, and political basis.

It is the Plaintiffs' burden to show that the racial considerations subordinated all other criteria, including neutral criteria and other non-racial criteria. The evidence provided thus far is in equipoise, and the Plaintiffs have not yet satisfied their burden on the predominance issue.

Plaintiffs rely on the testimony of Dr. Ansolabehere to complete their task. To begin, Dr. Ansolabehere notes the drop in compactness scores but, as discussed above, that is more of a flag than a conclusion. If compactness has been sacrificed to enhance contiguity or serve political ends, then race alone has not subordinated this criterion. Dr. Ansolabehere also analyzed VTD movements but, as discussed above, that analysis fails to account for other criteria that may be shaping the district, such as incumbency considerations or solving contiguity issues in nearby districts. Finally, Dr. Ansolabehere notes the number of VTD splits. But the majority of splits are attributable to incumbency considerations rather than race. Moreover, some splits appear to be attributable to Delegate Jones' twin aims of solving the water crossing and limiting population deviations to ±1%. In sum, we find Dr. Ansolabehere's testimony on each point to be

unconvincing. Thus, his evidence did not help the Plaintiffs in their obligation to prove predominance and to dislodge the presumption of lawful action to which the General Assembly's redistricting plan is entitled.

Based on the record, the Court finds that the Plaintiffs have not satisfied their burden to prove that racial considerations subordinated all other neutral and race-neutral districting criteria in the formation of HD 63. And, on the basis of the record, the Court holds, as a matter of fact, that race did not predominate in the drawing of HD 63.

2. District 75

HD 75 is found in the Dinwiddie-Greensville area and was represented by Delegate Roslyn Tyler during the 2011 redistricting process. Under the Benchmark Plan, the district contained all of Sussex County, Greensville, and Emporia City and parts of Brunswick, Franklin City, Isle of Wight, Lunenberg, and Southampton. Pls.' Ex. 50 at 69, Table 1. Under the Enacted Plan, the district now contains all of Emporia City and Greensville and parts of Brunswick, Dinwiddie, Franklin City, Isle of Wight, Lunenberg, Southampton, Surry, and Sussex. Id. This increased the number of county and city splits from 5 to 8 and increased the number of split VTDs from 4 to 13. Pls.' Ex. 50 at 69-70, Tables 1, 2. HD 75 has a core retention percentage of 78.64, Ints.' Ex. 14 at 83, and is contiguous by land.

On its face, the district appears relatively compact, despite its odd tendency to leak across county and city lines. Pls.' Ex. 66 at 6. The district had Reock and Polsby-Popper scores of .42 and .22 under the

Benchmark Plan, which shifted to scores of .41 and .19 under the Enacted Plan. Ints.' Ex. 15 at 15, Table 9. The district's Schwartzberg score is 2.282. Pls.' Ex. 51 at 11, Table 1. Although the district's technical compactness remained "about the same between the two plans," Trial Tr. 141: 4-5 (Ansolabehere), Delegate Tyler testified that her district has "[v]ery irregular borders" and is "not an easy district to follow," (Docket No. 90-2, Ex. B, 23:2-7).

A review of HD 75's boundaries suggests that she is right. Although the district has a clear southern border, that provides no solace because her district borders North Carolina. Unlike population equality and VRA compliance, state borders are not just mandatory; they admit no variation. As such, state borders are a nullity in the predominance balance. The only other county boundaries seemingly respected are those segments bordering Mecklenburg, Nottoway, Prince George, and Suffolk counties. Pls.' Ex. 66 at 6. Notable in this regard, is the addition of the district's lower left corner, which makes Brunswick County whole. Trial Tr. 323: 8-10 (Jones); Ints.' Ex. 94 at 7.

Delegate Dance testified that the creation of HD 75 "gave us a little trouble to try to get to the 55 percent." Trial Tr. 741:1-15 (Dance). To get to the 55% BVAP, the district "required some drastic maneuvering[.]" Id. Delegate Tyler herself testified that she "was concerned about the decrease in number of black people in my district." (Docket No. 90-2, Ex. B, 88:15-16.)

Although the irregularity of the district boundaries can be seen to buttress Delegate Dance's testimony that HD 75 required "drastic maneuvering" in order to comply with the 55% BVAP floor, the Intervenors have

offered their own explanations for the district's "very irregular borders." Delegate Jones testified that Dinwiddie County was split because the district was in need of population. Trial Tr. 323:2-4 (Jones). That appears to be the case because HD 75 was underpopulated. The choice to go north, however, was "to try to get [Delegate Tyler's] number . . . [o]f African-Americans voters up to 55 percent." Id. at 80:11-17 (Dance). Therefore, while underpopulation may help explain the changes to the district, it cannot be weighed against race in the predominance analysis.

The district's irregular eastern and western borders can be also attributed to race because, according to Delegate Dance, moving coherently to the "east [or] west would have been Euro-Americans, and she needed some African Americans to get to that 55 percent." Id. at 80:21-24 (Dance). Delegate Jones' testimony did not contradict that assessment.

Delegate Jones testified that many of the changes, such as swapping out the Wakefield and Dendron precincts, splitting Franklin City, and excluding the Berlin and Ivor precincts were done on the basis of a "member request" or because Delegate Tyler did not receive many votes in those removed precincts. See id. at 323:11-16; 324:12-16; 325:1-5 (Jones). Delegate Jones accepted these changes even though adherence to political subdivisions and compactness would be subordinated in the process. See id. at 323:11-16 ("[W]e had two other counties whole until . . . she requested that we swap [Wakefield and Dendron] out."); 325:14-16 ("I would have never done that had it not been requested because I wanted to split as few jurisdictional boundaries as I could[.]"). But attributing

the changes to "member requests" or performance concerns begs, rather than answers, the relevant question: was the request racial or political?

Like in HD 63, the evidence admits of both a racial purpose and a political purpose. For instance, Delegate Jones himself testified that Delegate Tyler's request to swap Wakefield and Dendron was based on "real concerns" stemming from the fact that she "didn't break 51 percent" in a general election race "with a Caucasian" and that she "won by less than 300 votes" in a "five-way race in a primary with two Caucasians." Id. at 323:19-324:3 (Jones). That bespeaks an effort to both protect the incumbent and prevent retrogression. Similarly, Delegate Jones testified: "[S]he was worried about too low of a black voting-age population for her to be able to be successful in an election." Id. at 322:10-12. This too reflects an effort to protect the incumbent while also preserving minority voters' ability to elect their candidate of choice.

Unlike in HD 63, however, here there is no ambiguity about the basis upon which voters were sorted. Intervenors' Post-Trial Brief relies upon the overlapping racial and political purposes to argue that race did not "predominate." According to the Intervenors, Delegate Tyler's deposition testimony "made crystal clear her view that '[w]hat I'm saying is most of the time blacks vote Democratic,' and that 'in [her] mind, the purpose of ensuring 55 percent BVAP was to help Democrats be elected.'" Ints.' Post-Trial Brief at 30-31 (citing Docket No. 90-2, Ex. B, 62:17-25 & 63:19-23). But, attributing a political purpose to – or justification for – the 55% BVAP floor does not somehow render it a non-racial classification. Whether

the changes were made to comply with Section 5, enhance Democratic performance, or protect the incumbent, the changes were still made based on voters' skin color.

Weighing all the evidence and testimony provided on the record, the Court finds that racial considerations subordinated traditional districting principles and other non-racial districting criteria in the creation of HD 75. The testimony from the three delegates primarily responsible for shaping the district, Delegates Jones, Tyler, and Dance, shows that the overriding objective was to achieve a 55% BVAP in HD 75. Achieving a 55% BVAP floor required "drastic maneuvering" that is reflected on the face of the district and, according to Delegate Jones, would not otherwise have been undertaken due to the impact on traditional county boundaries. Delegate Tyler herself found the boundaries "very irregular," worried about her ability to cover her district with ease, and was "concern[ed] about the decrease in number of black people in [her] district."

Intervenors attempt to explain the boundary deviations by ascribing a political purpose to them. But that attempt is not successful. As in Bush, the record shows that, in building HD 75, race was used by Delegate Tyler herself as a proxy for Democratic voters in an effort to protect her own position as an incumbent at the expense of traditional districting principles. 517 U.S. at 972-73 (principal opinion). When a legislator sorts voters by political affiliation or performance, then the deviation from neutral principles is a political one. But, when a legislator sorts voters by race, for whatever purpose, then the deviation is a racial one. As

explained above, the lesson of Cromartie was that a political deviation would not be considered racial simply because the Democratic voters happened to be black. Cromartie I, 526 U.S. at 542. The lesson was not that a racial deviation would be considered political simply because the black voters happened to be Democrats. That is using race as a proxy for political affiliation, an approach that is prohibited.[33]

As to HD 75, the Plaintiffs have proved (without reference to Dr. Ansolabehere' s testimony) that race was the predominate criterion leading to the disregard of neutral conventions in forming HD 75. Moreover, to the extent that political interests were considered and achieved, it appears that those criteria were secondary to, and only satisfied by, adherence to the 55% BVAP floor. Shaw II, 517 U.S. at 907 ("That the legislature addressed these interests does not in any way refute the fact that race was the legislature's predominant consideration.").[34]

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[33] See Bush, 517 U.S. at 968-73 (principal opinion) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification . . . But, to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation. . . . the fact that racial data were used in complex ways, and for multiple objectives, does not mean that race did not predominate over other considerations. The record discloses intensive and pervasive use of race both as a proxy to protect the political fortunes of adjacent incumbents, and for its own sake in maximizing the minority population of [the District].").

[34] The dissent argues that our interpretation of predominance will allow legislators to "mask" racial sorting and only permit plaintiffs to challenge districts that "manifest extreme line-drawing unexplainable on race-neutral grounds, like the district at issue in

Based on the foregoing analysis, the Court finds that race was the predominate criterion driving the formation and configuration of HD 75; and, therefore, the legislature's decision is subject to strict scrutiny. To survive strict scrutiny, the Intervenors must show that the legislature had a "strong basis in evidence" for its racial districting decisions.

The Court finds that this burden has been satisfied and that, accordingly, HD 75 survives the Plaintiffs' challenge. First, Delegate Jones' determination that HD 75 (or its environs) reflected an "ability-to-elect" district requiring protection against retrogression was a reasonable determination. As Plaintiffs themselves point out, HD 75 appeared to be a performing ability-to-elect district before the State's redistricting efforts. Pls.' Post-Trial Brief at 33-34 (citing Pls.' Ex. 50 at 85, Table 14). Therefore, retaining this ability to elect reasonably can be viewed as necessary to ensure actual compliance with the federal non-retrogression standard.

Next, as to HD 75, the 55% BVAP floor is grounded in a "strong basis in evidence" because the primary source of the 55% BVAP threshold appears to have been an analysis of HD 75 itself. For example, Delegate Jones testified that he did not feel a 52% BVAP threshold across all districts would be acceptable

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Shaw I." Post at 158, 166. Our holding with respect to HD 75 should put these fears to rest. The boundaries of HD 75 not only simultaneously advance racial and non-racial goals, but they are hardly egregious or "extreme." That has not prevented us from carefully examining the actual basis upon which voters were sorted and finding predominance satisfied where non-racial criteria were subordinated in fact.

"based on . . . the functional analysis that I had done using the Tyler primary, for example, and the Tyler general election in 2005." Trial Tr. 430:2-9 (Jones). These were close races, prompting "real concerns." Id. at 323:19-324:3 (Jones). Delegate Jones met with Delegate Tyler "probably half a dozen times to configure her district as she felt it needed to be configured for . . . [minority voters] to elect a candidate of their choice for her district." Id. at 322:6-12 (Jones).[35]

Delegate Jones examined turnout rates in HD 75, id. at 467:7-11 (Jones), an issue about which Delegate Tyler was particularly concerned, id. at 463:12-16 (Jones). In addition, Delegate Jones considered the district's prison population and relied upon his knowledge of the district's electoral history. Id. at 464:7-465:5; 458:18-459:18 (Jones). These are precisely the kinds of evidence that legislators are encouraged to use "[i]n determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan[.]" Pls.' Ex. 9 at 3 (76 Fed. Reg. Vol. 27 (Feb. 9, 2011) at 7471) ("[E]lection history and voting

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[35] The Court does not suggest that those designing redistricting plans can always just add more BVAP every time a meaningful challenger appears. Like Section 2, Section 5 does not "guarantee minority voters an electoral advantage," Bartlett, 556 U.S. at 20, it only requires that the system not effect a retrogression in minority voters' effective electoral franchise. Interpreting the VRA to allow more than this would render it an instrument in service of the same discriminatory practices it was designed to eliminate. This would be contrary to the plain language of the Fifteenth Amendment itself, let alone the precepts of equal protection. Where an application of the VRA cannot reasonably be said to have gone beyond the "remedial," however, it is this Court's duty to uphold it.

patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important to an assessment of the actual effect of a redistricting plan.").[36]

Plaintiffs dispute the need for raising the BVAP percentage in HD 75, arguing that the district was already a performing Section 5 district for minority-preferred candidates going into the 2011 redistricting. Pls.' Post-Trial Brief at 33-34 (citing Pls.' Ex. 50 at 85, Table 14). Here, that argument only strengthens the Intervenors' hand. Under the Benchmark Plan, BVAP in HD 75 was 55.3%. Under the Enacted Plan, BVAP in HD 75 was 55.4%. Id. at 34. Considering the intricacies of redistricting, the new HD 75 could effectively be considered to have the "same" BVAP level as the old HD 75. And, considering the evidence relied upon by Delegate Jones, it appears abundantly clear that he had "good reasons" for holding the BVAP in HD 75 just above 55% to ensure that the district remained a performing Section 5 district for minority-preferred candidates, as Plaintiffs' themselves suggest. Alabama, 135 S. Ct. at 1274.

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[36] Delegate Jones primarily testified about the 2005 election. See, e.g., Trial Tr. 458:15-459:18 (Jones). There were more recent elections in 2007 and 2009, but Delegate Tyler ran unopposed in those elections. See Pls.' Ex. 50 at 85, Table 14. The dissent suggests that these unopposed races "cas[t] significant doubt" on the contention that a 55% BVAP level remained necessary to prevent retrogression. Post at 173. But short of hiring a statistical analyst, it's hard to see how much useful information can be gleaned from the uncontested races. Should legislators have lowered the target by 1%, 2%, or 3%? Any preference for a 53% target instead of a 55% target would seem to rest upon speculation, not a stronger basis in evidence.

Nor does the 55% floor appear unreasonable when subjected to expert review. Plaintiffs' own expert noted that HD 63 and 75 "exhibit high rates of [racial] polarization because large majorities of Whites vote in the opposite way as large majorities of African Americans." Pls.' Ex. 50 at 51, 84, Table 14. Intervenors' expert agreed, observing that the 2011 and 2013 elections held in HD 75 were racially polarized. Ints.' Ex. 16 at 24, Table 4. Dr. Ansolabehere ultimately opined that a 55% BVAP threshold was not necessary in HD 75, Pls. 1 Ex. 50 at 55, but ex post statistical analyses cannot upset the State's ex ante judgment so long as that decision was "reasonably necessary" based on strong evidence.[37] In this case, it was so based. Alabama, 135 S. Ct. at 1273. Simply put, there were "good reasons" to believe that a 55% BVAP threshold was necessary to ensure that minority voting

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[37] The Court does not credit the racial polarization analysis conducted by Dr. Ansolabehere. His analysis drew from on-year statewide elections data (rather than off-year House of Delegates elections data). Trial Tr. 516:7-25 (Katz). We find that the use of the wrong elections led to unreliable results. Dr. Ansolabehere also relied on an ecological regression analysis (rather than an ecological inference analysis), which "doesn't make use of all . . . available information" and results in "blatantly incorrect answers." Id. at 521:10-14. As Dr. Katz testified, ecological regression "was great technology in 1950" when it was developed, but "[t]he world has come a long way in those intervening six decades." Id. at 519:11-22. This too makes Dr. Ansolabehere's testimony unreliable.

The Plaintiffs offered Dr. Ansolabehere's testimony on racial polarization as pertinent to the predominance analysis even though it would (were the Court to accept it as reliable – which it does not) be more probative of the narrow tailoring analysis. But, either way, his testimony on racial polarization is flawed and cannot be credited.

influence did not retrogress in HD 75, and the Court will not upset that reasonable judgment. Id. at 1274.

The Court finds that legislators had good reason to believe that maintaining a 55% BVAP level in HD 75 was necessary to prevent actual retrogression (and not just to attain preclearance), and that this was achieved by reasonable deviations from traditional redistricting criteria (judged by a sufficiency standard). Because the State has provided a "strong basis in evidence" for its use of race-based districting in its configuration of HD 75, the Court holds that HD 75 passes constitutional muster under the Equal Protection Clause of the Fourteenth Amendment.

3. District 69

HD 69[38] is found in the Richmond area and was represented by Delegate Betsy Carr during the 2011

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[38] In Wilkins, the Supreme Court of Virginia found that race did not predominate over other districting criteria under Virginia's state constitution in Districts 69, 70, 71, 77, 80, 89, and 90. 264 Va. at 477-79. This Court finds the rationale and outcome stated in Wilkins, with respect to these districts, informative but not determinative. First, perhaps the simplest explanation is that the 2011 map is not the 2001 map, several similarities notwithstanding. Second, the Wilkins court observed that the "trial court did not reference any specific evidence or make any specific findings for any of these districts to support a conclusion that race was the predominant factor in creating each district." Id. at 477. That is precisely the analysis this Court undertakes today. Third, the Wilkins court included population and core retention among the balancing criteria, which are either verboten or called into question by the Alabama decision. Compare id. at 478 with Alabama, 135 S. Ct. at 1270, 1271. Finally, there was no evidence before the Wilkins court suggesting the use of a racial floor in the subject districts.

redistricting process. Under both the Benchmark Plan and the Enacted Plan, the district contains parts of Chesterfield and Richmond City. Pls.' Ex. 50 at 69, Table 1. Although the number of county and city splits remained the same, redistricting increased the number of split VTDs from 2 to 4. Pls.' Ex. 50 at 69-70, Tables 1, 2. HD 69 has a core retention percentage of 74.7. Ints.' Ex. 14 at 83.

On its face, the district appears to reflect a large, compact swath of Richmond below the Fan District and to the south of the James River. The district had Reock and Polsby-Popper scores of .37 and .20 under the Benchmark Plan, which increased to scores of .52 and .34 under the Enacted Plan. Ints.' Ex. 15 at 15, Table 9. The district's Schwartzberg score is 1.712. Pls.' Ex. 51 at 11, Table 1. As Delegate Jones testified, the changes from the Benchmark Plan made the district more "Richmond centric," Trial Tr. 309:1 (Jones), which appears on its face to have enhanced the district's alignment with a distinct political subdivision and community of interest, Ints.' Ex. 94 at 2.

The Plaintiffs recognize that HD 69 has become more compact and retained its "core," but argue that the district has become more compact "only by incorporating heavily African-American communities at the outskirts of the benchmark district." Pls.' Post-Trial Reply at 15. Delegate McClellan also testified at trial that HD 69 had to satisfy the 55% BVAP floor, according to Delegate Jones. Trial Tr. 29:5-13 (Jones). But all of this is largely irrelevant. The question is whether the Commonwealth's consideration of race or a racial floor subordinated traditional, neutral criteria. Plaintiffs have offered no evidence to show

subordination, relying instead on the erroneous view that proof of a 55% BVAP floor would be sufficient to carry their burden. As explained previously, it is not.

With respect to potential deviations from neutral criteria, it should be noted that HD 69 is not contiguous by land. Ints.' Ex. 94 at 2. However, the district contains multiple river crossings, id., and no evidence has been provided by the Plaintiffs to show that the district improperly combines two distinct communities of interest rather than uniting one community of interest. Moreover, the Plaintiffs have not provided any evidence that this split has diminished representation for communities on either side of the James. As such, there is no evidence that contiguity was "subordinated" to non-neutral criteria.

In short, the Plaintiffs have failed to carry their burden of proof with respect to HD 69,[39] and the Court holds, as a matter of fact, that race did not predominate in the drawing of HD 69.

4. District 70

HD 70 is found in the Richmond area and was represented by Delegate Delores McQuinn during the 2011 redistricting process. Under both the Benchmark Plan and the Enacted Plan, the district contains parts

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[39] If anything, HD 69 seems to reflect the kind of district that might well be amenable to resolution on a motion for summary judgment based on a more structured understanding of the predominance inquiry, as provided above. See Abrams, 521 U.S. at 118 (Stevens, J., dissenting) ("Any redistricting plan will generate potentially injured plaintiffs, . . . [a]nd judges (unable to refer, say, to intent, dilution, shape, or some other limiting principle) will find it difficult to dismiss those claims[.]").

of Chesterfield, Henrico, and Richmond City. Pls.' Ex. 50 at 69, Table 1. Although the number of county and city splits remained the same, redistricting increased the number of split VTDs from 2 to 3. Pls.' Ex. 50 at 69-70, Tables 1, 2. HD 70 has a core retention percentage of 67.31. Ints.' Ex. 14 at 83.

On its face, the district appears coherent and generally compact, perhaps with the exception of the "turret" on top of the district. HD 70 straddles the intersection of Richmond City, Chesterfield County, and Henrico County, Pls.' Ex. 66 at 3, with most of the boundaries therein drawn on the basis of precinct and VTD lines, Ints.' Ex. 94 at 3. The district had Reock and Polsby-Popper scores of .47 and .14 under the Benchmark Plan, which shifted to scores of .40 and .19 under the Enacted Plan. Ints.' Ex. 15 at 15, Table 9. In other words, the district became slightly more elongated, but also removed some of its more convoluted and irregular boundaries in the process. The district's Schwartzberg score is 2.290. Pls.' Ex. 51 at 11, Table 1.

As the Plaintiffs contend, the redistricting "pull[ed] the district substantially out of the city of Richmond and pull[ed] it in to the Chesterfield area and deeper into Henrico County." Trial Tr. 142:7-10 (Ansolabehere). Plaintiffs believe that this shows a disregard for core retention, Pls.' Post-Trial Reply at 16, but this is precisely the reason the Court cautioned about "core retention" arguments above. Redistricting, by its very nature, involves the changing of districts. If a state completely abandoned its prior map and started from scratch, a hypothetical new "HD 70" might bear no resemblance whatsoever to the benchmark "HD 70,"

but that would not – taken alone – be suspicious. Moreover, such a hypothetical would entail "removing" the entire population of HD 70 and then "adding" that entire number back. Again, nothing about that would be inherently suspicious.

The question is whether the boundaries – or the changes to the boundaries – are justifiable by reference to traditional, neutral criteria. Here, they are. Delegate Jones testified that HD 70's overall configuration was altered to better represent suburban interests – where population had expanded – and to cede more Richmond-centered population to HD 69 and HD 71. Trial Tr. 310:18-311:21 (Jones). The Plaintiffs' case supports that point. Id. at 142:11-20 (Ansolabehere) ("[HD 70 has] substantially shifted from being . . . [a] plurality urban district to being a plurality suburban district."). These represent objectively identifiable communities of interest.

Plaintiffs also argue that HD 70 was not under-populated before the redistricting process, but "the General Assembly added about 26,000 people and removed about 26,000 people in redrawing the district." Pls.' Post-Trial Reply at 16. As discussed above, if properly populated districts were presumptively required to remain untouched, then all the other districts would need to wrap around them (in substantial disregard of neutral principles) in order to achieve population equality. See ante at 77 n.20; accord Trial Tr. 310:7-311:2 (Jones). Nor is the substitution in population numbers particularly shocking. If a properly populated district must shift locations, then it will necessarily "remove" a large amount of people from its

old location and "add" the same amount from its new location. That result seems rather obvious.

With respect to deviations, HD 70 – like HD 69 – is divided by the James, but contains a river crossing. Ints.' Ex. 94 at 3. And – like HD 69 – Plaintiffs have offered no evidence to suggest that this has had any effect on representation or local communities of interest. As such, there is no evidence that contiguity was "subordinated" to non-neutral criteria.

The only facially odd deviation sits atop the northern edge of the district. This "turret" appears to deviate from districting norms, especially insofar as it pokes across Richmond City lines. However, Intervenors offered a simple, non-racial explanation for this deviation: Delegate McQuinn, the incumbent, lives there. As Delegate Jones testified: "[H]ad she not lived there, I could have actually had all of the 71st District in the city of Richmond because I could have taken these couple of precincts and there wouldn't have been any going into the Radcliffe precinct in Henrico County for 71." Trial Tr. 311:3-17 (Jones).

In weighing the evidence, the Court recognizes that Delegate McClellan testified that HD 70 was drawn to comply with the 55% BVAP floor, id. at 29:5-13 (McClellan), but the legislature's pursuit of this goal is not the "predominate" criterion employed unless it subordinates all others. The Court finds that HD 70 is largely explained by reference to traditional, neutral districting criteria, and that the only deviation therefrom is explainable on the basis of "incumbent pairing prevention." As a result, this Court holds, as a matter of fact, that race did not predominate in the drawing of HD 70.

5. District 71

HD 71 is found in the Richmond area and was represented by Delegate Jennifer McClellan during the 2011 redistricting process. Under both the Benchmark Plan and the Enacted Plan, the district contains parts of Henrico and Richmond City. Pls.' Ex. 50 at 69, Table 1. Although the number of county and city splits remained the same, redistricting increased the number of split VTDs from 1 to 3. Pls.' Ex. 50 at 69-70, Tables 1, 2. HD 71 has a core retention percentage of 78.31, Ints.' Ex. 14 at 83, and is contiguous by land.

On its face, the district appears quite compact and generally follows normal districting conventions. The district had Reock and Polsby-Popper scores of .24 and .19 under the Benchmark Plan, which increased to scores of .33 and .24 under the Enacted Plan. Ints.' Ex. 15 at 15, Table 9. The district's Schwartzberg score is 2.045. Pls.' Ex. 51 at 11, Table 1. The district remains bounded to the south by the James River – a natural geographic boundary – and became "more Richmond centric" with the 2011 redistricting thanks to the removal of Summit Court, Hilliard, and Stratford Hall precincts from its western edge. Trial Tr. 305:2-7 (Jones).

The district itself includes the Fan, moves east through Richmond's downtown, and continues up to Church Hill. The district contains the majority of the North Side, and contains one precinct in eastern Henrico County. Id. at 24:22-25:1 (McClellan).

The only facially evident deviations are along HD 71's eastern border. Here, the district's one Henrico precinct and the 701, 702, and 706 VTDs seem to form

a set of "horns" on the eastern side of the district. See Pls.' Ex. 66 at 4; Ints.' Ex. 94 at 4.

In examining these deviations, it should first be noted that the northern-most horn adheres to the boundaries of Ratcliffe precinct, whereas the two other horns appear to adhere to the boundaries of VTDs 701, 702, and 706. Plaintiffs have argued that VTDs 701 and 702 were included because they were "heavily African American" and "very densely populated." Id. 43:15-18 (McClellan). The Plaintiffs have not discussed whether Ratcliffe was added to capture black voters. Although Delegate McClellan testified that the 55% BVAP rule affected the districting decisions as to HD 71, id. 29:5-13 (McClellan), the Plaintiffs bear the burden of showing that the decision subordinated neutral criteria in the process.

Plaintiffs have not satisfied that burden. Delegate Jones offered a far more convincing reason for HD 71's eastern horns. As discussed above, Delegate McQuinn lives right on the border of VTDs 703 and 705. Ints.' Ex. 94 at 4. "[H]ad [Delegate McQuinn] not lived [in Richmond], I could have actually had all of the 71st District in the city of Richmond because I could have taken these couple of precincts and there wouldn't have been any going into the Radcliffe precinct in Henrico County for 71." Trial Tr. 311:3-17 (Jones).

Plaintiffs also noted the split of VTD 505, which was previously wholly within HD 71. Id. at 42:20-43:4 (McClellan) ("That was split so that I got the VCU potion which is very densely populated, and (Delegate Carr) got the Oregon Hill neighborhood."). Although a VTD split constitutes a deviation from neutral principles, the decision to split 505 advanced other

neutral principles, such as compactness. Plaintiffs have not demonstrated that this split "subordinated" such neutral principles.

Delegate McClellan also spoke extensively about the removal of precinct 207 from her district, which split the Fan neighborhood. Id. at 39:14-20 ("207 and 208 are a majority of the Fan neighborhood where I live, and 207 was taken out[.]"). Precinct 207 had "highly democratic voter turnout," and Delegate McClellan had "quite a base there[.]" Id. at 39:21-24.

But this split does not appear to substantially disregard neutral principles on its face. A local resident might wonder why the Fan straddled two House districts, but any observer of the map would see that precinct 207 was removed and replaced with precinct 204, making the district more compact.

Nor does that swap appear obviously racial. As Delegate McClellan testified, precinct 204 is "demographically similar to 207 racially." Id. at 42:17-20. Delegate McClellan testified that she couldn't keep "any portion of 207" because it would "push the [BVAP] below 55 percent," id. at 40:1-9, but if the 55% BVAP goal could be achieved without subordinating neutral principles on the whole, it does not matter what Delegate McClellan's personal preferences were.

And here, her personal preferences appeared in conflict with those of another legislator: Delegate Loupassi. According to Delegate Jones, Delegate Loupassi used to be on the Richmond City Council and his former ward abutted precinct 207 where he had strong support, so he "wanted that precinct in his district." Id. at 305:15-307:12 (Jones). Delegate

McClellan argued that adding precinct 207 to Delegate Loupassi's district "didn't help him" because he is a Republican, id. at 42:2-11 (McClellan), but Delegate Jones testified that Delegate Loupassi has "a broad base of support from the democratic side of the aisle" and had a personal "community of interest" – rather than partisan – connection to the area, id. at 485:7-14 (Jones).

There is a difference between pruning the edges of the political thicket and striding headlong into it. By verifying a district's overall compliance with neutral criteria that do not discriminate between citizens based on their race or other individualized characteristics, the Court fulfills its constitutional duty to ascertain whether state legislation violates the Equal Protection Clause. The Court should not, however, become embroiled in a credibility dispute between two legislators, especially when resolving that "factual" issue is unnecessary to find that neutral criteria predominated in the drawing of the district boundaries. HD 71 does not substantially disregard traditional, neutral districting principles, and that is sufficient for the Court to find that these principles were not subordinated to race. The existence of a 55% BVAP floor does not disturb that fact.[40] Therefore, the Court

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[40] The Plaintiffs also observe that a request from the Richmond Registrar was denied in HB 5001, and it is alleged that this change was rejected because the BVAP in HD 71 would have dropped to 54. 8%. Pls.' Ex. 30. This provides strong evidence that a firm 55% BVAP rule was employed, as this Court has already held. See ante at 23 n. 7. But that finding does not imply that race "predominated" over neutral criteria in the drawing of HB 5005, especially because that particular "deviation" appears to have been addressed in HB 5005 itself. See Ints.' Ex. 7 at 2-3.

holds, as a matter of fact, that race did not predominate in the drawing of HD 71.

6. District 74

HD 74 is found in the Richmond area and was represented by Delegate Joseph Morrissey during the 2011 redistricting process. Under the Benchmark Plan, the district contained all of Charles City and parts of Henrico, Hopewell City, and Richmond City (as well as part of Prince George containing no population). Pls.' Ex. 50 at 69, Table 1. Under the Enacted Plan, the district now contains all of Charles City and parts of Henrico and Richmond City. Id. This decreased the number of county and city splits from 4 to 2, with the number of split VTOs remaining the same. Pls.' Ex. 50 at 69-70, Tables 1, 2. HD 74 has a core retention percentage of 80.08, Ints.' Ex. 14 at 83, and is contiguous by land.

On its face, the ax-shaped district arouses some suspicion. The "blade" of the ax encompasses all of Charles City, but the eastern "handle" is curious. The district had Reock and Polsby-Popper scores of .16 and .10 under the Benchmark Plan, which remained almost identical – with scores of .16 and .12 – under the Enacted Plan. Ints.' Ex. 15 at 15, Table 9. The district's Schwartzberg score is 2.839. Pls.' Ex. 51 at 11, Table 1. These low scores reflect the district's substantially elongated shape.

Despite its elongation, however, the district is not as unreasonable as it first appears. The north edge of the handle tracks the Henrico county line, while the lower edge is almost entirely retained within Henrico County. In fact, Delegate Jones' revision permitting the

upper edge to track Henrico county lines "put some more good Republican precincts in there that the gentleman in the 97th did not want to lose[.]" Trial Tr. 317:13-17 (Jones). The district has also improved on neutral metrics over the last three districting cycles. See Ints.' Ex. 14 at 60. In particular, the 2011 plan removed the water crossing discussed in Wilkins v. West. See 264 Va. at 465-66; Trial Tr. 316:15-25 (Jones).

The Intervenors also noted that the BVAP percentage in the district had been lowered substantially from the Benchmark Plan. See Trial Tr. 313:3-315:6; Pls.' Ex. 50 at 72. But the fact that the BVAP percentage dropped does not, taken alone, indicate that race was not the predominate criterion influencing the district's construction. As the Plaintiffs observe, much of the black population ceded from HD 74 went to other Challenged Districts, such as HD 63 and HD 71. See Pls.' Post-Trial Reply at 17. Unlike in a racial vote dilution claim, a racial predominance inquiry does not necessarily concern itself with whether the BVAP went up or down. A district formed primarily to eject black voters would employ the same racial classification as a district formed primarily to include black voters.

In the end, however, the primary objection to this district amounts to a criticism that the district is too long. But predominance is not merely a beauty contest centered on Reock-style compactness. Although this district certainly does not earn high marks in a qualitative predominance analysis, the Plaintiffs have failed to demonstrate that neutral criteria were substantially disregarded in the formation of HD 74.

The district contains all of Charles City and, for most of its length, has readily identifiable boundaries. Moreover, the shifting of black population into HD 63 and HD 71 largely improved HD 74's compliance with neutral criteria, such as contiguity and compactness.

Moreover, the district has retained roughly the same long shape since 1991. Trial Tr. 315:19-318:25 (Jones). Core retention alone cannot be used to save an otherwise offensive district, but it is worth holding in the balance if the familiarity of the boundaries has "allow[ed for the] development of relationships and communities of interest relative to election of delegates." Wilkins, 264 Va. at 466, 476.

On the whole, the Court finds that the Plaintiffs have failed to meet the predominance inquiry's "demanding burden" to show that racial considerations subordinated both neutral criteria and other race-neutral explanations in the formation of HD 74. Therefore, the Court holds, as a matter of fact, that race did not predominate in the drawing of HD 74.

7. District 77

HD 77 is found in the Portsmouth area and was represented by Delegate Lionel Spruill during the 2011 redistricting process. Under both the Benchmark Plan and the Enacted Plan, the district contains parts of Chesapeake and Suffolk. Pls.' Ex. 50 at 69, Table 1. The number of county and city splits remained the same, and the number of split VTDs decreased from 4 to 3. Pls.' Ex. 50 at 69-70, Tables 1, 2. HD 77 has a core retention percentage of 74.4. Ints.' Ex. 14 at 83.

At first glance, this jagged and elongated district is suspect. However, upon closer inspection, the top-right

corner of the district hews to strange county lines, while many curious features on the lower side of the district track natural water boundaries and precincts that are themselves rather jagged and elongated. The district had Reock and Polsby-Popper scores of .18 and .17 under the Benchmark Plan, which shifted to scores of .19 and .15 under the Enacted Plan. Ints.' Ex. 15 at 15, Table 9. The district's Schwartzberg score is 2.542. Pls.' Ex. 51 at 11, Table 1. With respect to neutral criteria, it appears that compliance therewith could still result in an inherently oddly-shaped district, but the record lacks guidance in this regard.

The record is similarly unclear and incomplete respecting deviations from traditional criteria. The district's large western chunk is admittedly attributable to a single precinct, but that does not answer why that whole half of the district is thrust so far into HD 76 as to nearly sever it in half. Ints.' Ex. 91 at 152. As Delegate Jones observed, the 76th and 77th districts share the most geographical boundary area on the map. Trial Tr. 334:2-4 (Jones).

Based on the alternative districting plans referenced by the Plaintiffs, see, e.g., Pls.' Ex. 23 at 40, it appears that it was possible to create the same number of performing districts in this region without resorting to this westward leap. So was this deviation necessary to reach the 55% BVAP floor (in which case, race might predominate), see Ints.' Ex. 92 at 15, or was this deviation motivated by a desire to remove Democrat performing precincts from Delegate Jones' district (in which case politics might predominate), see Ints.' Ex. 92 at 14? Or, is this overall structure attributable to the "knock-on" effects of avoiding

pairing incumbents in this region? If so, incumbency considerations might predominate, political performance might predominate, or racial considerations might predominate. These are all questions that Plaintiffs bore the burden of answering. The Court is not in a position to guess based on the skimpy evidence submitted.

But, the record does show that the district's already-strange 2001 design was somewhat ameliorated in HB 5005 by moving the "Airport District" precinct from HD 77 to HD 76, id. at 336:7-12 (Jones), and "reuniting" the "old city of South Norfolk" at Delegate Spruill's request, id. at 334:8-10 (Jones), which allowed segments of the new district to more closely track county boundaries and water boundaries, Pls.' Ex. at 7. These changes also served political ends. The Airport District is primarily Republican, so this transfer helped Delegate Jones, Trial Tr. 336:7-12 (Jones), whereas the "old city of South Norfolk" surrounds Delegate Spruill's residence, which was seen as politically advantageous for him as well, id. at 336:1-4. Although the neighborhoods added around Delegate Spruill also contained meaningful black populations, Tanglewood, Oaklette, Norfolk Highlands, Indian River, and Johnson Park were all majority-white precincts. Ints.' Ex. 92 at 15.

The Court also observes that the district is not contiguous by land and does not appear to possess a water crossing within its bounds, see Pls.' Ex. 66 at 7; Ints.' Ex. 94 at 9, but Plaintiffs have offered no substantive evidence on whether this deviation relates in any way to the attainment of the district's BVAP

level, which is 58. 8% in the Executed Plan, see Pls.' Ex. 50 at 72.

Based on the testimony, evidence, and arguments, the Court cannot ascertain from the record whether race, politics, or other criteria predominated in the formation of HD 77. Frankly, if the presumption of correctness and good faith has any meaning, it is applicable in this instance. The Plaintiffs simply point to the threshold's attainment of the 55% BVAP floor, evidence of racial correlation, and a low compactness score to prove that race predominated. There is no evidence-based explanation to show how, if at all, the racial floor impacted the boundaries of HD 77 or why voters were placed there in the redistricting process. The Plaintiffs cannot hand the Court a stone and expect back a sculpture.

It is at least as likely that politics and traditional districting factors account for the configuration and composition of HD 77 as it is that race was responsible. Because the Plaintiffs have failed to provide evidence as to the ways in which racial considerations might have had a "direct and significant impact" on the District's formation, the Court finds that the Plaintiffs have failed to meet the burden of proof required to show that race predominated in the construction of HD 77.

8. District 80

HD 80 is found in the Portsmouth area and was represented by Delegate Matthew James during the 2011 redistricting process. Under the Benchmark Plan, the district contained parts of Chesapeake, Norfolk, and Portsmouth. Pls.' Ex. 50 at 69, Table 1. Under the

Enacted Plan, the district now contains parts of Chesapeake, Norfolk, Portsmouth, and Suffolk. Id. This increased the number of county and city splits from 3 to 4 but decreased the number of split VTDs from 2 to 1. Pls.' Ex. 50 at 69-70, Tables 1, 2. HD 80 has a core retention percentage of 59.94. Ints.' Ex. 14 at 83.

At trial, Intervenors stated, "I think it's fair to say honestly that this district looks a little irregular." Trial Tr. 349:3-5 (Intervenors). But "a little irregular" is "a little bit of an understatement." The district is quite unusually configured. The district had Reock and Polsby-Popper scores of .39 and .26 under the Benchmark Plan, which experienced a substantial drop to scores of . 26 and .11 under the Enacted Plan. Ints.' Ex. 15 at 15, Table 9. The district's Schwartzberg score is 3.054 – the highest of all the Challenged Districts. Pls.' Ex. 51 at 11, Table 1.

Because the district makes little rational sense as a geographical unit, the Court will move directly to ascertaining the predominant purpose of the deviations. To begin, it is hard to identify what is now a "deviation" because it is hard to identify what is now the core of the district. The district is split by water twice without any apparent crossing enabling residents to stay within the district on either occasion. See Pls.' Ex. 66 at 8; Ints.' Ex. 94 at 10.

The Plaintiffs correctly note that HD 80's western border "winds (14.9%), its way around low Churchland (8.3%), BVAP precincts like high BVAP precincts such and Fellowship (14.2%) as Yeates (56.3%) and Silverwood to capture Taylor Road (48.8%)." Pls.' Post-Trial Brief at 19. Considering the district's attainment of the BVAP floor, this is the kind of detailed

explanation that might lead the Court to find that racial considerations subordinated all others. In this case, however, the Plaintiffs' racial explanation must contend with other "dominant and controlling" considerations: incumbency protection as well as geographic features and a naval base.

In addition to the constraints imposed by the James River, the Atlantic Ocean, and the Norfolk naval base, the district needed to retain the residence of Delegate James while avoiding the residences of Delegate Johnny Joannou (HD 79) and then-Delegate Kenneth Alexander (HD 89). Ints.' Post-Trial Brief at 34. The general – and relatively simple – problem was "a loss of population" in the area and the need to move district boundaries "from the oceanfront back . . . western to Suffolk" to capture population. Trial Tr. 349:6-11 (Jones). This problem became far more complex, however, because Delegates Alexander, Joannou, and Jones all live in relatively close proximity. Ints.' Ex. 94 at 10. To avoid pairing incumbents, Trial Tr. 350:23-24 (Jones), the westward shift of the districts had to wrap around the residences of the incumbents, resulting in the distortion found here. Thus, the map needed to "roll the population around . . . to make sure Delegate Joannou had a sufficient number of residents in his district" and narrow the neck of the district before leaping further out westward to avoid Delegate Joannou while capturing Delegate James. Id. at 350:10-20.

That explanation addresses why neutral criteria were subordinated, but it does not provide the basis upon which voters were sorted into the corresponding districts. "Incumbent pairing prevention" may have

resulted in "population rolls," but an equal population goal itself is not part of the predominance balance. Alabama, 135 S. Ct. at 1271 ("[Predominance asks] whether the legislature placed race above traditional districting considerations in determining which persons were placed in appropriately apportioned districts.") (internal quotation marks omitted).

"Incumbency protection," on the other hand, does provide an explanation for the amalgamation of precincts selected for HD 80. As the Intervenors explained:

> Although HD80 could have been drawn to take territory from HD76 represented by Delegate Jones the precincts there were Republican strongholds, and neither Jones nor HD80's representative, Democrat Matthew James, wanted that trade. Drawing HD80 into the former territory of HD79 gave those Democratic-leaning precincts to James, and not Jones. This arrangement made HD80 less compact than it would have been had it taken territory from Jones, but it was politically preferable. HD80 was also drawn to protect other incumbents, Johnny Joannou (HD79) and Kenneth Alexander (HD89), who resided near the borders they shared with HD80, making it impossible for HD80 to take territory to the north and northeast without pairing incumbents.

Ints.' Pre-Trial Brief at 16-17. Based on this record, it appears just as likely that precincts were selected for being highly Democratic and avoided for being highly Republican, see Ints.' Ex. 92 at 16, as it is that precincts were selected for being highly African-

American and avoided for being highly Caucasian, see id. at 17. And, just because "the most loyal Democrats happen to be black Democrats" does not mean that a political gerrymander is thereby transformed into a racial gerrymander. Cromartie I, 526 U.S. at 551.

On the whole, the Court finds that the Plaintiffs have not carried the burden of demonstrating that racial considerations subordinated neutral districting criteria and other non-racial districting criteria, including incumbent pairing prevention and incumbency protection. Although the existence of the BVAP floor itself weighs in favor of a racial predominance finding, the Court finds, as a matter of fact, that – qualitatively – the "dominant and controlling" factor dictating the construction of HD 80 was incumbency protection, and that race did not predominate in the drawing of HD 80.

9. District 89

HD 89 is found in the Norfolk area and was represented by then-Delegate Kenneth Alexander during the 2011 redistricting process. Under both the Benchmark Plan and the Enacted Plan, the district is contained wholly within Norfolk. Pls.' Ex. 50 at 69, Table 1. There were no county or city splits and the number of split VTDs remained the same under both plans. Pls.' Ex. 50 at 69-70, Tables 1, 2. HD 89 has a core retention percentage of 76.86. Ints.' Ex. 14 at 84.

On its face, the district appears reasonably compact and generally follows precinct lines within Norfolk. The district had Reock and Polsby-Popper scores of .58 and .31 under the Benchmark Plan, which dropped to scores of .40 and .20 under the Enacted Plan. Ints.' Ex.

15 at 15, Table 9. The district's Schwartzberg score is 2.263. Pls.' Ex. 51 at 11, Table 1.

Although the district is not contiguous by land, it does contain water crossings within the district. See Pls.' Ex. 66 at 9; Ints.' Ex. 94 at 11. One of these crossings is largely to blame for the district's relative drop in compactness. Trial Tr. 144:9-145:1 (Ansolabehere). The added precinct – Berkley – contains a high BVAP percentage, see Ints.' Ex. 92 at 19, but is also relatively close to Delegate Alexander's residence, see Ints.' Ex. 94 at 11.

In addition, the district added a small "pipe" to its northernmost border, which includes a funeral home owned by Delegate Alexander. Trial Tr. 345:1-5. As Delegate Jones explained, Virginia state legislators are "part-time citizen legislators," many of whom regularly interact with their constituents in their professional capacities. Id. at 346:2-18. As such, having a business within the district enables incumbents to more readily engage with their constituents.

Weighing all evidence, it appears that a couple of small deviations possibly could be attributable either to racial or to incumbency considerations, but the district's composition is predominantly attributable to traditional, neutral principles. Therefore, the Court holds that the Plaintiffs did not carry the burden of proving that race predominated in the drawing of HD 89.

10. District 90

HD 90 is found in the Norfolk area and was represented by Delegate Algie Howell, Jr. during the 2011 redistricting process. Under the Benchmark Plan,

the district contained parts of Chesapeake, Norfolk, and Virginia Beach. Pls.' Ex. 50 at 69, Table 1. Under the Enacted Plan, the district now contains parts of Norfolk and Virginia Beach. Id. This decreased the number of county and city splits from 3 to 2 and the number of split VTDs remained the same. Pls.' Ex. 50 at 69-70, Tables 1, 2. HD 90 has a core retention percentage of 63.21. Ints.' Ex. 14 at 84.

On its face, the district appears to represent a reasonably compact geographic unit. The district had Reock and Polsby- Popper scores of .35 and .24 under the Benchmark Plan, which shifted to scores of .46 and .20 under the Enacted Plan. Ints.' Ex. 15 at 15, Table 9. The district's Schwartzberg score is 2.221. Pls.' Ex. 51 at 11, Table 1.

Apart from the district's two extensions into Virginia Beach and lack of land contiguity, HD 90 seems to largely comply with traditional, neutral districting conventions. See Pls.' Ex. 66 at 10; Ints.' Ex. 94 at 12. Even these "deviations," however, must be viewed in context. Specifically, the 2011 redistricting plan improved the district's compliance with the "political subdivisions" criterion by removing a segment from Chesapeake. And, the southern appendage that reaches into Virginia Beach tracks the county line on its western border. Id. Moreover, one of the district's jumps across water connects parts of Norfolk. Id. As such, this land-contiguity failure simultaneously serves to unite a political subdivision and community of interest.

On the record submitted, neutral criteria appear to predominate. Even if the southern appendage reaching into Virginia Beach were enough for the district as a

whole to exhibit a "substantial disregard" for neutral principles, it hardly appears that this offending piece of land could be viewed as racially driven. In fact, that segment of Virginia Beach contains some of the lowest BVAP percentages in the entire district. See Ints.' Ex. 92 at 21. Therefore, the Court holds that the Plaintiffs did not carry the burden to prove that race predominated in the drawing of HD 90, notwithstanding that it satisfies the 55% BVAP floor.

11. District 92

HD 92 is found in the Hampton area and was represented by Delegate Jeion Ward during the 2011 redistricting process. Under both the Benchmark Plan and the Enacted Plan, the district is contained wholly within Hampton. Pls.' Ex. 50 at 69, Table 1. The district contains no county or city splits, and redistricting lowered the number of split VTDs in the district from 3 to 0. Pls.' Ex. 50 at 69-70, Tables 1, 2. HD 92 has a core retention percentage of 77.27. Ints.' Ex. 14 at 84.

On the whole, the Court finds it hard to imagine a better example of a district that complies with traditional, neutral districting principles. The district had Reock and Polsby-Popper scores of . 28 and .15 under the Benchmark Plan, which increased to scores of .34 and .26 under the Enacted Plan. Ints.' Ex. 15 at 15, Table 9. The district's Schwartzberg score is 1.970. Pls.' Ex. 51 at 11, Table 1.

As a result of the 2011 redistricting process, the district became more compact, reunified downtown Hampton, Trial Tr. 356:13-20 (Jones), and eliminated all precinct splits. Moreover, most of the district's

southern border is marked by the waterfront and much of the district's western border now follows the Hampton boundary, making it easily identifiable to voters. See Pls.' Ex. 66 at 11; Ints.' Ex. 94 at 13. Although the district is not contiguous by land, it contains water crossings to allow voters to travel between parts of the district without traversing other districts. Id. The Court holds, as a matter of fact, that traditional, neutral criteria – not race – predominated in the construction of HD 92.

12. District 95

HD 95 is found in the Hampton area and was represented by Delegate Mamye Bacote during the 2011 redistricting process. Under both the Benchmark Plan and the Enacted Plan, the district contains parts of Hampton and Newport News. Pls.' Ex. 50 at 69, Table 1. Although the number of county and city splits remained the same, redistricting increased the number of split VTDs from 1 to 6. Pls.' Ex. 50 at 69-70, Tables 1, 2. HD 95 has a core retention percentage of 62.15, Ints.' Ex. 14 at 84, and is contiguous by land.

Their proximity notwithstanding, HD 92 and HD 95 share little in common. From bottom to top, the district begins by encompassing the full width of Newport News but soon departs from any observable neutral criteria. As the district moves northwest, a sliver attributable to the River precinct extends into HD 94 before the district works its way entirely over into Hampton City. There it remains for a period before extending briefly back into Newport News via the South Morrison precinct. After retreating back into Hampton City the district then hits water and York County, which it weaves around before running up

through the middle of Newport News in a narrow spike. See Pls.' Ex. 66 at 12; Ints.' Ex. 94 at 14. If there is any reasonably neutral explanation for the route followed, this Court was not informed . The district had Reock and Polsby-Popper scores of .43 and .28 under the Benchmark Plan, which dropped to scores of .14 and .14 under the Enacted Plan. Ints.' Ex. 15 at 15, Table 9. This rendered HD 95 the least compact district on the map under the Reock metric. See Ints.' Ex. 14 at 76-78, Table 9. The district's Schwartzberg score is 2.657. Pls.' Ex. 51 at 11, Table 1.

Rather than attempting to explain the district through neutral criteria, the Intervenors themselves acknowledge that the construction of the district was "significantly political." Trial Tr. 359:6-8 (Jones). According to Delegate Jones, the district's movement north fallows heavily Democratic precincts and then narrowly jumps through two Republican precincts in order to capture another strongly Democratic voting area at its northernmost tip. Id. at 369:1-4; Ints.' Ex. 92 at 24. Moreover, the district's eastward "zig" followed by its westward "zag" managed to avoid including the residence of Delegate Robin Abbott in HD 95. See Ints.' Ex. 94 at 14. This avoided pairing female Democratic incumbents and, in conjunction with the partisan maneuvering above, placed Delegate Abbott in a more heavily Republican swing seat. Trial Tr. 369:6-372:12 (Jones). As Intervenors explained: "HD95 was crafted carefully to avoid taking HD94's Republican precincts and instead take Democratic-leaning population left behind by HD93 and reach into precincts surrounded by HD93 to dilute Democratic voting strength in that area." Ints.' Pre-Trial Brief at 18.

The Court finds that explanation persuasive. Where there is a correlation between race and party, the burden is upon the Plaintiffs to dislodge the evidence showing that voters were sorted predominantly on the basis political preference rather than race. Delegate Jones had access to political performance data as well as racial data. As the Intervenors asked during closing argument: "[I]f race was the principal factor, why [did the legislature) pass by all these areas which have more black voters [in the southern part of the peninsula and] go up there [to the northern tip of the district]? . . . We don't hear any analysis from the other side on that point. There's no contradictory testimony." Trial Tr. 827:6-19 (Intervenors). On the evidence submitted, political advantage (based on partisan performance data) has been shown to have been the dominant and controlling consideration guiding the district's unorthodox boundaries. As a result, the Court holds, as a matter of fact, that race did not predominate in the construction of HD 95.

V. CONCLUSION

For the foregoing reasons, the Court holds that each of the twelve Challenged Districts withstands constitutional scrutiny under the Equal Protection Clause, and judgment will be entered for the Defendants and the Intervenor-Defendants.

It is so ORDERED.

/s/
Robert E. Payne
Senior U.S. District Judge

/s/
Gerald Bruce Lee
U.S. District Judge

Richmond, Virginia
Date: October 22, 2015

BARBARA MILANO KEENAN, Circuit Judge, dissenting:

Today, despite the Supreme Court's clear warning against the mechanical use of racial targets in redistricting, this court upholds the Virginia General Assembly's application of a one-size-fits-all racial quota to twelve highly dissimilar legislative districts. This quota was used to assign voters to districts based on the color of their skin without the constitutional protection afforded by strict scrutiny.

I recognize that the legislature in this case did not have the benefit of the Supreme Court's decision in Alabama, and I do not doubt that individual legislators acted in good faith in the redistricting process. Nevertheless, the resulting legislative enactment has affected Virginia citizens' fundamental right to vote, in violation of the Equal Protection Clause. Accordingly, I would invalidate Virginia's 2011 redistricting plan.

I.

Redistricting decisions are almost always made with a "consciousness of race," Bush v. Vera, 517 U.S. 952, 958 (1996) (principal opinion of O'Connor, J.), and such awareness does not necessarily result in a violation of the Equal Protection Clause, see Miller v. Johnson, 515 U.S. 900, 916 (1995). However, when a legislature is "motivated" by racial considerations, this

inherently suspect system of racial classification must satisfy the rigorous requirements of strict scrutiny. Miller, 515 U.S. at 916.

A plaintiff asserting a race-based equal protection claim in a redistricting case has the burden of proving "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." Id. (emphasis added). Under this predominance test, a plaintiff must show that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." Id.; see also Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1271 (2015) ("(T]he 'predominance' question concerns which voters the legislature decides to choose, and specifically whether the legislature predominantly uses race as opposed to other, 'traditional' factors when doing so." (emphasis in original)). When a legislature has "relied on race in substantial disregard of customary and traditional districting principles," such traditional principles have been subordinated to race. Miller, 515 U.S. at 928 (O'Connor, J., concurring).

Strict scrutiny is required when race was the predominant factor that categorically was accorded priority over race-neutral districting factors. As the Supreme Court has explained, traditional factors have been subordinated to race when "[r]ace was the criterion that, in the State's view, could not be compromised," and when traditional, race-neutral criteria were considered "only after the race-based decision had been made." Shaw v. Hunt, 517 U.S. 899, 907 (1996) (Shaw II); see also Page v. Va. Bd. of Elections, No. 3:13cv678, 2015 WL 3604029, at *7 (E.D.

Va. June 5, 2015). Thus, while a redistricting plan may reflect certain traditional districting criteria, that plan nevertheless remains subject to strict scrutiny when those criteria have been subordinated to a process that has sorted voters primarily by race.

Contrary to the majority's view, this predominance inquiry does not require that the use of race in drawing district boundaries be in "conflict" with traditional districting criteria. Maj. Op. at 36. In fact, the race of a voter often correlates with other districting considerations, including partisan preference, incumbency protection, and communities of interest. See Bush, 517 U.S. at 964 (principal opinion). The conclusion logically follows, therefore, that racial sorting frequently will not be in "conflict" with these and other districting criteria.

Because such districting criteria can be used to mask racial sorting, courts must carefully examine the evidence under the test for predominance articulated in Miller and Shaw II. Under that test, race necessarily predominates when the legislature has subordinated traditional districting criteria to racial goals, such as when race is the single immutable criterion and other factors are considered only when consistent with the racial objective. Shaw II, 517 U.S. at 907.

II.

This case presents a textbook example of racial predominance, in which a uniform racial quota was the only criterion employed in the redistricting process that could not be compromised. This one-size-fits-all quota automatically made racial sorting a priority over any other districting factor. Although a legislature is

entitled to a presumption of good faith, this presumption must yield when the evidence shows that citizens have been assigned to legislative districts primarily based on their race. See Miller, 515 U.S. at 915-16; Page, 2015 WL 3604029, at *8 ("[T]he good faith of the legislature does not excuse or cure the constitutional violation of separating voters according to race." (citation omitted)). For this reason, I disagree with the majority's conclusion that a uniform racial quota merely is "evidence" of predominance, and instead would hold that the existence of such a widely applied quota establishes predominance as a matter of law.

A.

I first observe that while the parties have engaged in a semantical debate whether the 55% BVAP threshold was an "aspirational target" or a "rule," the evidence presented at trial clearly established that the legislature employed the 55% BVAP figure as a fixed, non-negotiable quota. Three individual delegates testified regarding their understanding of the mandatory nature of the quota.[41] Pl. Ex. 33 at 45 (Sen. Dance); Trial Tr. at 70 (Sen. Dance) ; Trial Tr. at 29-30 (Del. McClellan); Trial Tr. at 92 (Del. Armstrong). And, despite Delegate Jones' trial testimony that the 55% BVAP figure was merely an "aspirational . . . rule of thumb," he promoted the plan during the House of Delegates floor debates as having achieved a 55% minimum BVAP for all majority-minority districts.

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[41] Delegates Dance and Armstrong no longer serve in the House of Delegates, though Dance currently serves as a senator in the Virginia Senate. Trial Tr. at 65, 90.

Trial Tr. at 491; Pl. Ex. 35 at 42, 66, 70, 72, 108, 113. The legislators' subjective understanding that the 55% figure operated as a mandatory floor further was corroborated by the fact that, in the 2011 plan, the BVAP in most of the twelve challenged districts converged toward 55% while each district satisfied the 55% BVAP floor. Pl. Ex. 50 at 72 Table 4; DI Ex. 15 at 14.

B.

The "disregard of individual rights" is the "fatal flaw" in such race-based classifications. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (opinion of Powell, J.); see also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.) (explaining that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948))). By assigning voters to certain districts based on the color of their skin, states risk "engag[ing] in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." Miller, 515 U.S. at 911-12 (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993) (Shaw I)) (internal quotation marks omitted). Quotas are especially pernicious embodiments of racial stereotypes, because they threaten citizens' "'personal rights' to be treated

with equal dignity and respect."[42] Croson, 488 U.S. at 493 (opinion of O'Connor, J.).

Here, the plan contravened the rights of individual voters by applying a one-size-fits-all racial quota for black voters in twelve highly dissimilar districts, without regard to the characteristics of the voters or of their communities. The 55% quota thus is a classic example of race-based stereotyping and unequal treatment prohibited by the Equal Protection Clause.

The Supreme Court's skepticism of racial quotas is longstanding. See generally Croson, 488 U.S. 469 (minority setaside program for construction contracts); Bakke, 438 U.S. 265 (higher education admissions). However, the Court has yet to decide whether use of a one-size-fits-all racial quota in a legislative redistricting plan or, in particular, use of such a quota well exceeding 50%, establishes predominance as a matter of law under Miller.

The Court recently has cautioned against "prioritizing mechanical racial targets above all other districting criteria" in redistricting. Alabama, 135 S. Ct. at 1267, 1272-73. Although the Court in Alabama did not decide whether the use of a racial quota well exceeding 50%, of itself, can establish predominance, the Court made clear that such "mechanical racial targets" are highly suspicious. Id. at 1267; see id. at

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[42] Because individual voters suffer the harm alleged in a racial sorting claim, I disagree with the majority's contention that "intentional[] dilut[ion] [of a] group's meaningful participation in the electoral process" is required to sustain an equal protection challenge like the one the plaintiffs have raised in this case. Maj. Op. at 52 (emphasis omitted). See Miller, 515 U.S. at 911-13.

1272-73 (discussing racial targets as part of narrow tailoring analysis). After issuing this admonishment and identifying several errors in the district court's analysis, the Court ultimately remanded the case to the district court to reconsider the question of predominance.[43] Id. at 1270-74.

The uniform racial quota employed in the present case is more suspicious on its face than the racial thresholds at issue in Alabama. The legislature in Alabama sought to maintain preexisting racial percentages specific to each district with the aim of avoiding retrogression under Section 5. Id. at 1263. In contrast, the racial quota used in the present case was applied indiscriminately to all twelve districts irrespective of the particular characteristics of those districts. The Virginia plan's one-size-fits-all quota thus raises even more serious concerns that the legislature's districting decisions were driven primarily by race.

In view of the Virginia legislature's application of a single racial quota to numerous districts in the case before us, this court is not presented with the question whether a particular fixed BVAP percentage would trigger strict scrutiny if applied to a single district. Nor is this court asked to decide whether strict scrutiny is required every time a legislature intentionally creates

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[43] I disagree with the majority's conclusion that the Supreme Court in Alabama would not have remanded the case if the use of racial thresholds in that case constituted predominance as a matter of law. See Maj. Op. at 35. Appellate courts frequently remand issues to trial courts for reconsideration when a trial court initially has employed an incorrect legal analysis.

a majority-minority district. See Bush, 517 U.S. at 998 (Kennedy, J., concurring) (reserving the question); Alabama, 135 S. Ct. at 1272 (declining to decide whether "the intentional use of race in redistricting, even in the absence of proof that traditional districting principles were subordinated to race, triggers strict scrutiny"); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 517 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part) ("[W]hen a legislature intentionally creates a majority-minority district, race is necessarily its predominant motivation and strict scrutiny is therefore triggered.").

Instead, the more narrow question before this court is whether strict scrutiny is required when a uniform racial quota of 55% has been applied by a legislature in drawing twelve legislative districts that are highly dissimilar in character.[44] Here, because traditional districting criteria were considered solely insofar as they did not interfere with this 55% minimum floor, see Shaw II, 517 U.S. at 907, the quota operated as a filter through which all line-drawing decisions had to pass.[45]

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[44] I therefore disagree with the majority's contention that this question was answered by the principal opinion in Bush and by the majority in Shaw II. Maj. Op. at 46, 55. Neither Bush nor Shaw II presented the unique factual circumstances at issue in this case, namely, the application of an across-the-board 55% racial quota to twelve variable districts.

[45] Although the majority is correct that the district at issue in Shaw II exhibited more facial irregularities than the districts here, such distinctions do not preclude application of relevant principles from the case. Shaw II, 517 U.S. at 905-06. Maj. Op. at 55. As the Court noted in Shaw II, the fact that a legislature is able to achieve certain traditional districting goals in a race-based plan

Such a racial filter necessarily had a discriminatory effect on the configuration of the districts, because it rendered all traditional criteria that otherwise would have been "race-neutral" tainted by and subordinated to race. See Miller, 515 U.S. at 916 (holding that when "race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can defeat a claim that a district has been gerrymandered on racial lines" (citation and internal quotation marks omitted)). Under these circumstances, although a legislature may take into account traditional districting criteria, race-neutral application of those criteria becomes impossible and all decisions necessarily are affected by race. Therefore, I would hold that the plaintiffs have established as a matter of law under Miller that race predominated in the legislative drawing of each of the challenged districts, and I would apply strict scrutiny in examining the constitutionality of those districts.

III.

In stark contrast, the majority's predominance analysis accepts the use of this facially suspicious racial quota. In doing so, the majority places an unwarranted burden on the plaintiffs to show that the quota had identifiable effects on the drawing of particular district lines. The majority thus effectively would require the plaintiffs to present an alternative legislative map showing how lines could have been drawn differently without imposing the 55% quota.

"does not in any way refute the fact that race was the legislature's predominant consideration." Shaw II, 517 U.S. at 907.

Such an onerous burden, however, far exceeds the required showing for establishing predominance.[46]

Additionally, under the majority's test, visual inspection of a district would be fatal to an equal protection claim if the district's boundaries appear to be consistent with traditional criteria, irrespective of direct evidence that the line-drawing was racially motivated at the outset. Thus, as a result of the majority's analysis, and its requirement that the use of race be in actual "conflict" with traditional districting criteria, future plaintiffs asserting a racial sorting claim will be restricted to challenging districts that manifest extreme line-drawing unexplainable on race-neutral grounds, like the district at issue in Shaw I.

As the Supreme Court has emphasized, however, a district that is bizarre in shape is not the constitutional harm prohibited by the Equal Protection Clause. Rather, as stated above, the constitutional harm results from individual voters being sorted into districts based on the color of their skin. Miller, 515 U.S. at 911-15 (explaining that it is "the presumed racial purpose of state action, not its stark manifestation, that [is] the constitutional violation"). By requiring that use of race actually "conflict" with traditional redistricting criteria, the majority's predominance test often will fail to identify constitutionally suspect racial sorting.

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[46] I further observe that the plaintiffs presented testimony from Delegate McClellan that she did not propose certain desired changes to the plan because the resulting lines would not comply with the 55% quota. Trial Tr. at 41.

IV.

In reviewing a redistricting plan, courts typically examine whether a plan complies with traditional districting factors, such as compactness and contiguity, when evaluating whether there is evidence of racially motivated decision making. See Shaw I, 509 U.S. at 647 (traditional districting factors are not constitutionally required, but "they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines"). When a legislative district is bizarre in shape, that fact "may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." Miller, 515 U.S. at 913. Here, however, the majority relies on shape and other traditional districting factors to uphold the 2011 plan, even in the face of the overwhelming, direct evidence of racial motivation evidenced by the use of a one-size-fits-all racial quota.

The majority's analysis is not aided by Cromartie II and Bush. In Cromartie II, the Court described the predominance inquiry as requiring plaintiffs to show that a district's boundaries were drawn "because of race rather than because of" other districting criteria. Easley v. Cromartie, 532 U.S. 234, 257 (2001) (emphasis omitted). However, a legislative district necessarily is crafted "because of race" when a racial quota is the single filter through which all line-drawing decisions are made.

Similarly, the principal opinion in Bush explained that "[s]ignificant deviations from traditional districting principles . . . cause constitutional harm

insofar as they convey the message that political identity is, or should be, predominantly racial." Bush, 517 U.S. at 980 (principal opinion). The import of this language is obvious. The harm caused by racial stereotyping is apparent when racial sorting manifests itself in odd district boundaries that are visible to any observer. But the incidence of constitutional harm is not limited to the presence of a district that is odd in shape. In the present case, the legislature's use of a racial quota resulted in constitutional harm, because that methodology "convey[ed] the message that political identity is, or should be, predominantly racial." Id.

I also disagree with the intervenors' implicit suggestion that approval by incumbent legislators in the challenged districts somehow rescues predominance. The Voting Rights Act (VRA) and the Equal Protection Clause are intended to protect the rights of the individual voter, not to promote the self-interest of incumbents in majority-minority districts. See League of United Latin Am. Citizens, 548 U.S. at 440-41 ("If . . . incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters."). To the contrary, immunizing incumbents from challenge could entrench them in overwhelmingly safe districts and undermine the representatives' accountability to their constituents. One can easily imagine how such entrenchment could harm minority voters by discouraging challengers from running and by preventing voters from electing a new candidate who better represents their interests. "Packing" minority voters into a particular majority-minority district for

the purpose of protecting the incumbent also can reduce minority voters' ability to influence elections in nearby districts.[47]

A true predominance analysis also is not affected by the fact that, at the time of the 2010 census, nine of the twelve challenged districts already had a BVAP of 55% or higher. DI Ex. 15 at 13-14 & Table 8; Pl. Ex. 50 at 9 ¶ 17, 72 Table 4. Even assuming that such figures could protect the configuration of those nine districts in the 2011 plan, the three remaining districts still would be subject to strict scrutiny. Moreover, given the significant population deficits in most of the challenged districts, our inquiry must focus on "which voters the legislature decide[d] to choose" when moving voters between districts in order to achieve population equality. Alabama, 135 S. Ct. at 1271 (emphasis in original). Here, the legislature's decision to move certain voters in order to maintain a preexisting 55% BVAP floor in the new plan is still a "mechanically numerical" method of redistricting that is subject to strict scrutiny. See id. at 1273.

I therefore conclude that the majority's approach effectively and improperly places on plaintiffs asserting racial predominance in redistricting a burden never assigned by the Supreme Court. Under the majority's

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[47] I recognize that the plaintiffs in this case do not raise a vote dilution claim under Section 2 of the VRA, but instead bring an "analytically distinct" racial sorting claim under the Equal Protection Clause. See Miller, 515 U.S. at 911 (citing Shaw I, 509 U.S. at 652) . I note the potential detrimental effects of the plan only to highlight that a so-called "benign" racial quota, ostensibly intended to benefit minority voters, may in fact have the opposite effect.

analysis, plaintiffs now will be required to show circumstantial evidence of racial motivation through "actual conflict" with traditional districting criteria, when such plaintiffs traditional already have presented dispositive direct evidence that the legislature assigned race a priority over all other districting factors.

V.

Even upon applying its heightened predominance standard, the majority concludes that race was the predominant factor in the drawing of District 75. I would hold that, under the majority's test, the same conclusion of predominance holds true for neighboring District 63 as well.

As a result of the "drastic maneuvering" required to reach a 55% BVAP in District 75, portions of a county previously in District 63 were shifted into District 75, a move that the majority agrees was "avowedly racial." Trial Tr. at 74, 80; Maj. Op. at 109. The plan compensated for this loss of BVAP in District 63 by adding to the district new areas with high BVAP concentrations. Trial Tr. at 81-83. Due to the changes in the 2011 plan, District 63 experienced a startling reduction in compactness and an increase in the number of split cities, counties, and VTDs. DI Ex. 15 at 15 Table 9; Pl. Ex. 50 at 7, 70 Table 2, 71 Table 3. This and other evidence showed that implementation of the 55% racial quota had a marked impact on the configuration of both Districts 63 and 75.

VI.

I further conclude that none of the challenged districts can survive the test of strict scrutiny, because the legislature's use of the 55% quota was not narrowly

tailored to achieve a compelling state interest in any of the challenged districts. See Miller, 515 U.S. at 920. Evidence of narrow tailoring in this case is practically non-existent.

Assuming that compliance with the VRA is a compelling state interest, attempts at such compliance "cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application" of federal law. Id. at 921; see also Bush, 517 U.S. at 977 (principal opinion). Thus, narrow tailoring requires that the legislature have a "strong basis in evidence" for its race-based decision, that is, "good reasons to believe" that the chosen racial classification was required to comply with the VRA. Alabama, 135 S. Ct. at 1274 (emphasis omitted).

In the present case, the intervenors presented virtually no evidence supporting the need for application of a 55% BVAP in any of the challenged districts. In fact, Delegate Jones even had difficulty articulating the original source of the 55% figure. Trial Tr. at 429, 431, 443, 490-95.

The only evidence suggestive of any tailoring involved District 75. Delegate Jones testified that he conducted a "functional analysis" of Delegate Tyler's primary and general election results in 2005, and considered the significant prison population in that district, which together supported the imposition of a 55% racial floor. Trial Tr. at 323-24, 430, 458-59, 462-67, 494; Pl. Ex. 40 at 39 (Del. Tyler). However, Jones' statements were merely general and conclusory in nature and, therefore, fell far short of demonstrating a "strong basis in evidence" for the application of a racial

quota. Not only did the 2005 elections occur six years prior to the 2011 redistricting, but Tyler ran unopposed in the two elections since, casting significant doubt on Jones' contention that District 75 was so competitive that a minority-preferred candidate required at least a 55% BVAP to be re-elected from 2011 onward. See Pl. Ex. 50 at 85 Table 14. And, critically, Jones failed to provide any explanation of how his "functional" review led him to conclude that a 55% BVAP was required in District 75 to ensure compliance with the VRA.

The evidence supporting the use of the 55% racial quota in the remaining challenged districts was even weaker. The House of Delegates did not conduct an analysis regarding the extent of racially polarized voting in any of these districts. Trial Tr. at 469. Although Delegate Jones stated that he was aware of low registration rates among black voters, he also admitted that he did not review voter registration figures when drawing the plan. Trial Tr. at 462-64. Nor did he examine minority turnout rates in most of the challenged districts, or consider state Senate districts, congressional maps, or other maps that had been precleared or rejected by the Department of Justice. Trial Tr. at 462-69. And, in attempting to justify imposition of the 55% BVAP quota in District 63, Jones stated that he "t[hought] there was a primary" in which Delegate Dance ran as an independent, which results he reviewed, but he did not specify how those results led him to select a 55% BVAP threshold in District 63. Trial Tr. at 466-68. Such unsubstantiated and general comments plainly do not constitute the strong basis in evidence required to satisfy strict scrutiny.

Finally, I do not think that the outcome of this case, in favor of either party, is dependent on any of the expert testimony.[48] However, I pause to note that I find the testimony offered by Dr. Katz to be singularly unpersuasive on the issue of narrow tailoring. Dr. Katz admitted that he provided only a "crude" analysis of the likelihood that a candidate preferred by minority voters would be elected. Trial Tr. at 531. According to Dr. Katz, this "crude" method demonstrated that a 55% BVAP correlates with an 80% chance of electing a black candidate. DI Ex. 16 at 18-19; Trial Tr. at 532.

Dr. Katz' crude analysis exhibits two glaring flaws. First, it underrepresents the likelihood that the preferred candidate of minority voters would be elected by evaluating only the likely success of black candidates, when minority voters had elected non-minority delegates in certain of the challenged districts. Trial Tr. at 532-34, 549-51, 769-71. Second, and more fundamentally, Dr. Katz' analysis is flawed because the VRA does not guarantee the success of a candidate of a particular race in a given election. Rather, the VRA ensures that minority voters do not "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," and that minority voters retain their existing ability to elect their

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[48] I agree with the majority's criticism that Dr. Ansolabehere did not consider any factors other than race and politics as predictors of VTD inclusion in the challenged districts. Maj. Op. at 105. Nevertheless, my conclusion, that the legislature's use of the 55% racial quota per se establishes predominance as a matter of law, renders Dr. Ansolabehere's opinions regarding VTD movement superfluous to a proper predominance analysis.

preferred candidates.[49] 52 U.S. C. § 10301(b); League of United Latin Am. Citizens, 548 U.S. at 428 (VRA Section 2); 52 U.S.C. § 10304(b); Alabama, 135 S. Ct. at 1272 (VRA Section 5).

For these reasons, I would find that the record utterly fails to show that the legislature had a "strong basis in evidence" for using the 55% racial quota in any of the challenged districts. Accordingly, I would hold that all the districts fail the test of strict scrutiny.

VII.

The promise of the Equal Protection Clause is the guarantee of true equality under the law, enforced by our courts for the protection of our citizens irrespective of the power of any governmental entity. The Virginia legislature's use of the racial quota in this case violated this core constitutional principle in the absence of a strong basis in evidence supporting its race-based decision. Thus, I would invalidate Virginia's 2011 redistricting plan. I respectfully dissent.

/s/
Barbara Milano Keenan
U.S. Circuit Judge

Richmond, Virginia
Date: October 22, 2015

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[49] Although my conclusions do not depend on the testimony of Dr. Ansolabehere, I am not persuaded by the majority's dismissal of Dr. Ansolabehere' s racial polarization analysis. See Maj. Op. at 124 n.37. In particular, I credit Dr. Ansolabehere's conclusion that none of the challenged districts required a 55% BVAP in order to ensure minority voters' opportunity to elect their preferred candidate. Trial Tr. at 203.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 3:14-cv-00852-REP-AWA- BMK

[Filed July 6, 2018]

Golden Bethune-Hill, *et al.*,	)
Plaintiffs,	)
	)
v.	)
	)
Virginia State Board of Elections, *et al.*	)
Defendants.	)
	)

Notice of Appeal to the Supreme Court of the United States

Notice is given that the Virginia House of Delegates and M. Kirkland Cox, in his official capacity as Speaker of the Virginia House of Delegates, the Defendant-Intervenors in the above-captioned case, hereby appeal to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1253, from the order of this three-judge court entered in this action on June 26, 2018, ECF No. 235, enjoining the defendants from employing the 2011 House of Delegates districting plan in future elections and ordering them to draw a remedial districting plan.

Dated: July 6, 2017

Respectfully Submitted,
/s/ Katherine L. McKnight

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Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Eastern District of Virginia by using the court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated: July 6, 2018 */s/ Katherine L. McKnight*
Katherine L. McKnight

APPENDIX E

U.S. Const. Amend. XIV

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such

male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

52 U.S.C. § 10301

Formerly cited as 42 U.S.C. § 1973

§ 10301. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10304

Formerly cited as 42 U.S.C. § 1973c

§ 10304. Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the first sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the second sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the third sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such

qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in

accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

APPENDIX F

Excerpt from Voting Rights Section Freedom of Information Act Disclosure

See Fold-Out Exhibit next 2 pages

Confidential

Memorandum of Telephonic Communication

Date: 5/26/2011 **Attorney/Analyst:** EEK, JP2, JS2

File No.: 2011-1805

Other Party: (b)(7)(C) **Race:** (b)

Tel. No.: (b)(7)(C)

Title/Organization: (b)(7)(C)

Jurisdiction: State of Virginia

Subject: Chapter 1 (H.B. 5005) (2011)

(b)(7)(C) (b)(7)(C) two major concerns. (1) (b) wanted to make sure that the thirteen members of the Black Caucus were safe. (2) (b) had concerns for the overall Democratic Party.

The Republicans are in power, but because everyone knew the Department of Justice would be reviewing the plans, (b)(7) believes the plan is as fair as possible. (b)(7) believed the process was fair because those in power reached out to the Democrats to find out their needs.

(b)(7)(C) a House of Delegates with 100% Democrats, but that is not the state of things. But given the circumstances, it was fair.

(b)(7) feels that the thirteen districts currently represented by black delegates are safe under the proposed plan. With respect to the non-minority districts represented by black delegates, (b)(7)(C) (b)(7)(C) believes their districts are safe. (b)(7)(C) (b)(7)(C) district is safe because the it is heavily Democratic, and the Republicans cannot take it back. Under the proposed plan, (b)(7)(C) (b)(7)(C) (b)(7)(C) will also be safe because the district is a Democratic district. (b)(7)(C) (b)(7)(C)

(b)(7)(C) members of the Black Caucus were "tickled pink" with the proposed plan. (b)(7)(C) (b)(7)(C) later (b)(7)(C) were not satisfied.

(b)(7)(C) (b)(7)(C) Although the minority numbers in Delegate Tyler's district decrease without the prison population, her district is safer because it is also heavily democratic. There is a concern

EXHIBIT 15 Davis 3-21-15 KW

that a white Democrat will take the seat, but (b) feels that a black candidate will be able to hold the seat.

(b)(7)(C) is unhappy because (b) wanted (b)(7)(C) (b) described it as a "turf war."

There are two minority districts whose seats are filled by white delegates, (b)(7)(C) a district with approximately 60% bpop. (b)(7)(C) a district with approximately 65% bpop.

There have been several elections in those two districts, Districts 69 and 74, in which the minority vote was split among several minority candidates. However, (b)(7)(C) both delegates do a good job representing their minority districts, and they have the support of the minority constituents.

(b)(7)(C) raised the 13th minority district issue. (b)(7)(C) (b)(7)(C) Districts 69 and 74 demonstrate that creating a black seat does not mean a black candidate will be elected to office.

(b)(7)(C) did not set a target BVAP number. The 55% is not an important number to (b)(7)(C) can win with 40%.

(b) does not think the minority districts are packed too tightly. (b)(7)(C) thinks they are just right. (b)(7) does not have any concerns about a discriminatory purpose in drawing the district lines. If there was such a concern, (b)(7) would have addressed it.

The public involvement and input in the redistricting process was an improvement from previous years. There were town meetings all over the state. (b)(7)(C) concerned about having "black input," and (b) was satisfied with the level of input received.

(b) is satisfied with the plan and believes it to be a good plan.

VSBE 005592